

Indiana Law Review



Volume 26 No. 4 1993

1992 Survey of Recent Developments in Indiana Law

Contributors to this Issue


Patrick Baude
Terry A. Bethel
Kevin W. Betz
Ivan E. Bodensteiner
Douglass G. Boshkoff
Kevin Brown
Susan D. Burke
Nancy L. Cross
Rhonda L. Fuller
John C. Hamilton
Rolanda Moore Haycox
Steven K. Huffer
Lawrence A. Jegen, III
Karen A. Jordan

Charles M. Kidd
Brent Edward Kidwell
Randal M. Klezmer
Walter Krieger
Neal Lewis
John R. Maley
George T. Patton, Jr.
Thomas R. Ruge
Michael G. Ruppert
Richard K. Shoultz
Elizabeth A. Smith
Robert G. Solloway
John C. Trimble

ARTICLE

Origin, Development, and Current Status of
Fiduciary Duties in Close Corporations: Has Indiana
Adopted a Strict Good Faith Standard?

John R. Van Winkle
Gary R. Welsh



Digitized by the Internet Archive
in 2011 with funding from
LYRASIS Members and Sloan Foundation

Career Move.

No doubt you plan to start a successful legal career soon, so here's a tip:

Start reading *Law Week* now. While you're still in law school.

Why? Because top attorneys nationwide read *Law Week* every week, and as you know, it's never a bad idea to follow in the footsteps of the best. But more importantly—

Law Week gives you complete coverage of today's most important cases, with immediate notification of precedent-setting court decisions in every legal field, plus unparalleled Supreme Court reporting.

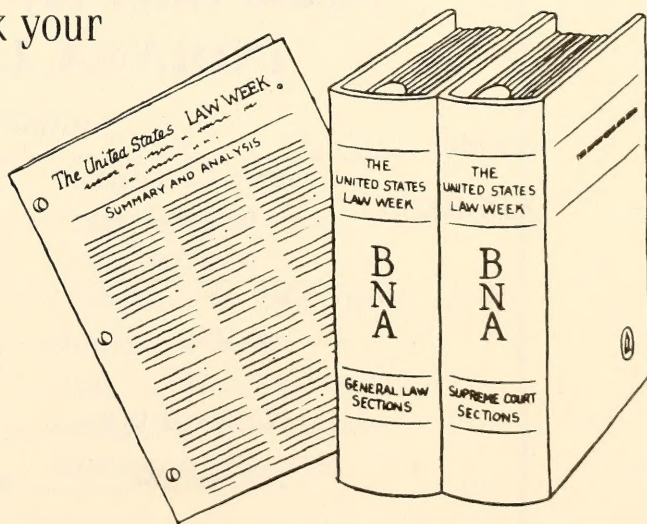
Indeed, *Law Week* puts you on the cutting edge of American law.

What better way to start a successful legal career.

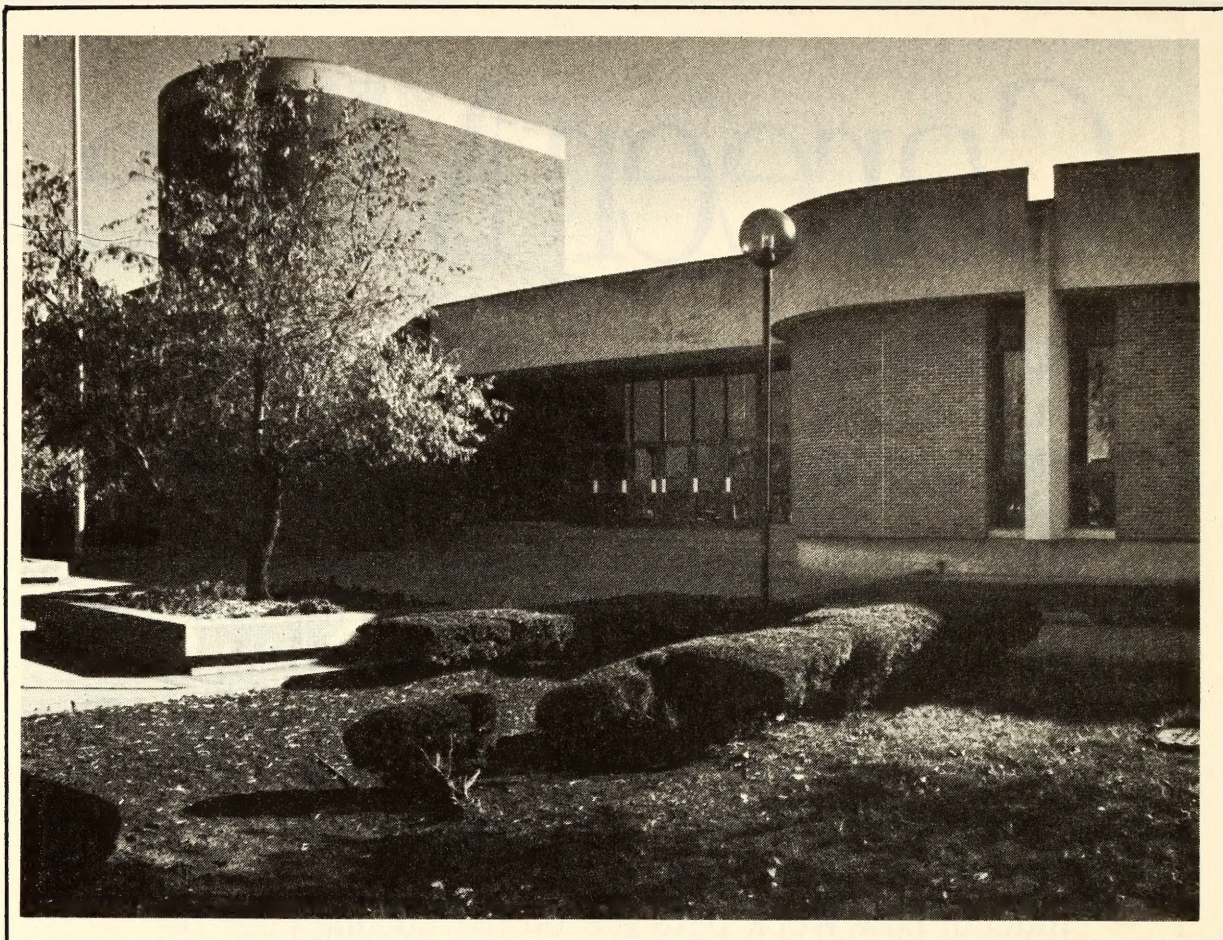
Make your move now. Ask your professor for details on *Law Week's* low student rates today.



The Bureau of National Affairs, Inc.
1231 25th Street, N.W.
Washington, D.C. 20037
202/452-4200



The United States
Law Week



**Please enter my subscription to the
INDIANA LAW REVIEW**

NAME _____

ADDRESS _____

Enclosed is \$_____ for _____ subscriptions.

Bill me for _____ subscriptions.

Mail to:

INDIANA LAW REVIEW
INDIANA UNIVERSITY
SCHOOL OF LAW—INDIANAPOLIS
735 West New York Street
Indianapolis, Indiana 46202

Subscription Rates (one year):

Regular, \$25; Foreign, \$28; Student, \$17 (4 issues)

Single Issue, \$8; Survey Issue \$17

Indiana Law Review

Volume 26

1992-93

Editor-in-Chief

Michael J. Mitchell

*Executive Managing
Editor*

Gary C. Messplay

*Executive Editor
Articles*

Amy L. Ficklin

*Executive Editor
Notes and Topics*

Anne H. Murray

Articles Editors

Scott D. Alfree

Elizabeth Sherman Cox

Christopher J. Dull

Brent E. Kidwell

Mitchel A. Mick

Elizabeth A. Roberge

Gary R. Welsh

Note Development Editors

Adel James Chareq

Anita Hodgson

Tom Scifres

Michael Ray Smith

Associate Editors

John H. Allie

Adam Arceneaux

Shanda Beach

Chris Belch

Jeff Decker

Charles P. Edwards

Karen L. Fisher

Victoria Gorczyca

Craig Lawson

Don McGuire

Catherine M. Morrison

Dan L. O'Korn

Ann L. Theobald

Gregg M. Wallander

Samantha Williams

Editorial Assistant

Amy Morrison Grubbs

Faculty Advisor

Debra A. Falender

INDIANA LAW REVIEW

(ISSN 0090-4198)

Published four times a year by Indiana University. Editorial and Business Offices are located at:

Indiana Law Review
735 W. New York Street
Indianapolis, IN 46202
(317) 274-4440

Subscriptions. The current subscription rates are \$25.00 per four-issue volume (domestic mailing) and \$28.00 (foreign mailing). Unless the Business Office receives notice to the contrary, all subscriptions will be renewed automatically. Address changes must be received at least a month prior to publication to ensure prompt delivery and must include old and new addresses and the proper zip code.

Single and Back Issues. Current single regular issues may be obtained from the *Law Review* Business Office for \$8.00. Current Survey issues may be purchased for \$17.00. Please enclose payment with order. Complete sets and single issues of prior volumes are also available from the *Law Review* Business Office. Unless a claim is made for nonreceipt of issues within one year of the mailing date, we cannot guarantee supplying the issues without charge.

Manuscripts. The *Indiana Law Review* invites submission of unsolicited manuscripts. All citations should conform to *A Uniform System of Citation* (15th ed. 1991). Manuscripts should be triple-spaced with wide margins. The *Indiana Law Review*, as a matter of policy, promotes the use of gender-neutral language, and alternate use of the female or male pronoun is intended to refer to both female and male.

Copyright. All articles Copyright 1993 by The Trustees of Indiana University, except where otherwise indicated. All rights reserved. Opinions expressed are those of the contributor and are not presented as the views of the *Indiana Law Review*, its editors, or Indiana University School of Law-Indianapolis.

Indiana Law Review

Volume 26

1993

Number 4

Copyright © 1993 by the Trustees of Indiana University

TABLE OF CONTENTS

SURVEY

- I. Supreme Court Review**
An Examination of the Indiana Supreme Court Docket,
Dispositions, and Voting in 1992
Kevin W. Betz 691
- II. Americans with Disabilities Act**
The Americans with Disabilities Act of 1990:
Overview and Analysis
Brent Edward Kidwell 707
- III. Business and Commercial Law**
Bankruptcy in the Seventh Circuit: 1992
Douglass G. Boshkoff 749

Developments in Contract and Commercial Law
Robert G. Solloway 761

Recent Developments in Corporation Law
Elizabeth A. Smith 781
- IV. Civil Procedure**
1992 Developments in Indiana Appellate Procedure:
Of Timely Praecipes, Interlocutory Appeals, and Civility
George T. Patton, Jr. 799

1992 Federal Practice and Procedure Update for Seventh
Circuit Practitioners
John R. Maley 817

Volume 26

1993

Number 4



The entire text of this Law Review is printed on recycled paper.

- V. Constitutional Law**
Recent Constitutional Decisions in Indiana
Patrick Baude 853
- Recent Developments in the Termination of School Desegregation Decrees
Kevin Brown 867
- VI. Criminal Law and Procedure**
Update—Criminal Law and Procedure
Susan D. Burke 891
- VII. Environmental Law**
Environmental Law: The Roles of Commerce, Citizens, and the Land in an Era of Intensifying Competition
John C. Hamilton 921
- VIII. Evidence**
Evidence: Indiana Moves Toward Adoption of the Federal Rules
Ivan E. Bodensteiner 965
- IX. Family Law**
The Progression of Indiana's Family Law in 1992
Michael G. Ruppert
Nancy L. Cross 977
- X. Health Care Law**
1992: A Year of Change for Our Health Care System
Rolanda Moore Haycox 1003
- Survey of Recent Developments in Medical Malpractice Law
Thomas R. Ruge
Rhonda L. Fuller 1023
- XI. Insurance Law**
Survey of Recent Developments in Insurance Law
John C. Trimble
Richard K. Shoultz 1051
- XII. Labor and Employment Law**
Recent Employment Law Decisions of the Seventh Circuit and the Indiana Courts
Terry A. Bethel 1065

XIII. Professional Responsibility

Survey of 1992 Developments in the Indiana Law of
Professional Responsibility

Charles M. Kidd 1097

XIV. Property Law

1992 Developments in Indiana Property Law

Walter Krieger 1113

XV. Taxation

1992 Developments in Indiana Taxation

Lawrence A. Jegen, III

John R. Maley 1145

XVI. Torts

Survey of 1992 Developments in Tort Law

Karen A. Jordan

Neal Lewis 1159

Survey of 1992 Developments in the Indiana Law of
Product Liability

Steven K. Huffer

Randal M. Klezmer 1203

ARTICLE

Origin, Development, and Current Status of Fiduciary
Duties in Close Corporations: Has Indiana Adopted a
Strict Good Faith Standard?

John R. Van Winkle

Gary R. Welsh 1215

Indiana University School of Law—Indianapolis

1992-93 ADMINISTRATIVE OFFICERS AND FACULTY

Administrative Officers

- THOMAS M. EHRLICH, *President of the University and Professor of Law*. LL.B., Harvard University.
- GERALD L. BEPKO, *Vice-President, Indiana University; Chancellor, Indiana University-Purdue University at Indianapolis and Professor of Law*. J.D., IIT/Chicago-Kent College of Law; LL.M., Yale University.
- NORMAN LEFSTEIN, *Dean and Professor of Law*. LL.B., University of Illinois; LL.M., Georgetown University.
- THOMAS B. ALLINGTON, *Associate Dean for Academic Affairs and Professor of Law*. J.D., University of Nebraska; LL.M., New York University.
- ARLENE G. ANDERSON, *Assistant Dean for Student Affairs*. J.D., Indiana University-Indianapolis.
- JONNA M. KANE, *Assistant Dean for External Affairs*. J.D., Indiana University-Indianapolis.
- JONI D. THOMPSON, *Assistant Dean for Development*. M.S., Ball State University.
- ANGELA M. ESPADA, *Assistant Dean for Admissions*. J.D., Indiana University-Bloomington.

Faculty

- THOMAS B. ALLINGTON, *Associate Dean and Professor of Law*. B.S., J.D., University of Nebraska; LL.M., New York University.
- EDWARD P. ARCHER, *Professor of Law*. B.M.E., Rensselaer Polytechnic Institute; J.D., LL.M., Georgetown University.
- JAMES F. BAILEY, III, *Professor of Law and Director of Law Library*. A.B., J.D., M.A.L.S., University of Michigan.
- GERALD L. BEPKO, *Vice President, Chancellor and Professor of Law*. B.S., Northern Illinois University; J.D., IIT/Chicago-Kent College of Law; LL.M., Yale University.
- ROBERT BROOKINS, *Associate Professor of Law*. B.S., University of Southern Florida; J.D., Ph.D., Cornell University.
- DANIEL H. COLE, *Assistant Professor of Law*. A.B., Occidental College; A.M., University of Chicago; J.D., Lewis and Clark College; J.S.M., Stanford Law School.
- PAUL N. COX, *Professor of Law*. B.S., Utah State University; J.D., University of Utah; LL.M., University of Virginia.
- CLYDE HARRISON CROCKETT, *Professor of Law*. A.B., J.D., University of Texas; LL.M., University of London (The London School of Economics and Political Science).
- DEBRA A. FALENDER, *Professor of Law*. A.B., Mount Holyoke College; J.D., Indiana University-Indianapolis.
- DAVID A. FUNK, *Professor of Law*. A.B., College of Wooster; J.D., Case Western Reserve University; M.A., The Ohio State University; LL.M., Case Western Reserve University; LL.M., Columbia University.
- PAUL J. GALANTI, *Professor of Law*. A.B., Bowdoin College; J.D., University of Chicago.
- HELEN P. GARFIELD, *Professor of Law*. B.S.J., Northwestern University; J.D., University of Colorado.
- HAROLD GREENBERG, *Professor of Law*. A.B., Temple University; J.D., University of Pennsylvania.
- JEFFREY W. GROVE, *Professor of Law*. A.B., Juniata College; J.D., George Washington University.
- FRANCES W. HARDY, *Clinical Assistant Professor of Law*. B.S., Ball State University; J.D., Indiana University-Indianapolis.
- WILLIAM F. HARVEY, *Carl M. Gray Professor of Law & Advocacy*. A.B., University of Missouri; J.D., LL.M., Georgetown University.
- PAUL T. HAYDEN, *Assistant Professor of Law*. B.A., Yale University; J.D., University of California, Los Angeles.
- W. WILLIAM HODES, *Professor of Law*. A.B., Harvard College; J.D., Rutgers Newark.
- LISA C. IKEMOTO, *Assistant Professor of Law*. B.A., University of California, Los Angeles; J.D., University of California, Davis; LL.M., Columbia University.
- LAWRENCE A. JEGEN, III, *Thomas F. Sheehan Professor of Tax Law and Policy*. A.B., Beloit College; J.D., M.B.A., The University of Michigan; LL.M., New York University.
- HENRY C. KARLSON, *Professor of Law*. A.B., J.D., LL.M., University of Illinois.
- WILLIAM ANDREW KERR, *Professor of Law*. A.B., West Virginia University; J.D., LL.M., Harvard University; D.B., Duke University.

ELEANOR D. KINNEY, *Professor of Law and Director of the Center for Law and Health*. B.A., Duke University; M.A., University of Chicago; J.D., Duke University; M.P.H., University of North Carolina.

WALTER W. KRIEGER, *Associate Professor of Law*. A.B., Bellarmine College; J.D., University of Louisville; LL.M., George Washington University.

NORMAN LEFSTEIN, *Dean and Professor of Law*. LL.B., University of Illinois; LL.M., Georgetown University.

DEBORAH MCGREGOR, *Lecturer in Law*. B.A., University of Evansville; J.D., Georgetown University.

WILLIAM E. MARSH, *Professor of Law*. B.S., J.D., University of Nebraska.

SUSANAH M. MEAD, *Professor of Law*. B.A., Smith College; J.D., Indiana University-Indianapolis.

MARY H. MITCHELL, *Professor of Law*. A.B., Butler University; J.D., Cornell Law School.

JAMES P. NEHF, *Assistant Professor of Law*. B.A., Knox College; J.D., University of North Carolina.

THOMAS R. NEWBY, *Lecturer in Law*. A.B., J.D., Indiana University-Bloomington.

LESLYE A. OBIORA, *Assistant Professor of Law*. LL.B., University of Nigeria; LL.M., Yale Law School; J.S.D. Candidate Stanford Law School.

KIMBERLY E. O'LEARY, *Clinical Assistant Professor of Law*. B.A., Oberlin College; J.D., Northwestern University.

DAVID R. PAPKE, *Professor of Law and American Studies*. A.B., Harvard College; J.D., Yale University; M.A. in American Studies, Yale University; Ph.D. in American Studies, The University of Michigan.

RONALD W. POLSTON, *Professor of Law*. B.S., Eastern Illinois University; LL.B., University of Illinois.

JOAN M. RUTHENBERG, *Director of Legal Writing*. B.A., Mississippi University for Women; J.D., Indiana University-Indianapolis.

ANDREW T. SOLOMAN, *Lecturer in Law*. A.B., University of Michigan; J.D., Boston University.

KENNETH M. STROUD, *Professor of Law*. A.B., J.D., Indiana University-Bloomington.

JAMES W. TORKE, *Professor of Law*. B.S., J.D., University of Wisconsin.

JOANNE ORR VAN PELT, *Visiting Assistant Professor*. J.D., California Western.

JAMES PATRICK WHITE, *Professor of Law and Consultant on Legal Education to the American Bar Association*. A.B., University of Iowa; J.D., LL.M., George Washington University.

LAWRENCE P. WILKINS, *Professor of Law*. B.A., The Ohio State University; J.D., Capital University Law School; LL.M., University of Texas.

MARY T. WOLF, *Director of Clinical Programs*. B.A., Saint Xavier College; J.D., University of Iowa College of Law.

Emeriti

AGNES P. BARRETT, *Associate Professor Emerita*. B.S., J.D., Indiana University.

CLEON H. FOUST, *Professor Emeritus*. A.B., Wabash College; J.D., University of Arizona.

JOHN S. GRIMES, *Professor of Jurisprudence Emeritus*. A.B., J.D., Indiana University.

MELVIN C. POLAND, *Cleon H. Foust Professor of Law Emeritus*. B.S., Kansas State University; LL.B., Washburn University; LL.M., University of Michigan.

R. BRUCE TOWNSEND, *Cleon H. Foust Professor of Law Emeritus*. A.B., Coe College; J.D., University of Iowa.

Adjunct Faculty

CYNTHIA M. ADAMS, J.D., Indiana University-Indianapolis.
RICHARD P. GOOD, J.D., Indiana University-Indianapolis.
RALPH F. HALL, J.D., University of Michigan.
GRANT W. HAWKINS, J.D., Indiana University-Indianapolis.
THOMAS Q. HENRY, J.D., Indiana University-Indianapolis.
SWADESH S. KALSI, LL.M., George Washington University.
JON D. KRAHULIK, J.D., Indiana University-Indianapolis.
LARRY A. LANDIS, J.D., Indiana University-Indianapolis.
JANE MAGNUS, J.D., Indiana University-Indianapolis.
SHARON F. MURPHY, J.D., Indiana University-Indianapolis.
LAURA C. NEHF, J.D., University of Georgia.
GARY P. PRICE, J.D., Indiana University-Indianapolis.
THOMAS R. RUGE, J.D., Valparaiso University.
GEOFFREY SEGAR, J.D., Indiana University-Bloomington.
JOHN R. VANWINKLE, J.D., Indiana University-Bloomington.
PATRICIA P. WAGNER, J.D., Indiana University-Indianapolis.

Law Library Faculty

JAMES F. BAILEY III, *Professor and Director of Law Library*. A.B., J.D., M.A.L.S., University of Michigan.
MINDE C. GLENN, *Assistant Director for Readers' Services*. B.A., Western Michigan University; M.L.S., Indiana University.
WENDELL E. JOHNTING, *Catalog Librarian*. A.B., Taylor University; M.L.S., Indiana University.
MAHNAZ K. MOSHFEGH, *Acquisition/Serials Librarian*. B.A., National University of Iran; M.S., Tehran University; M.A., Ball State University; M.L.S., Ph.D., Indiana University.
KIYOSHI OTSU, *Computer System Specialist and Catalog Librarian*. A.A., Parkland College; A.B., M.S., C.A.S., University of Illinois.
TERENCE L. ROSE, *Reference Librarian*. B.G.S., M.L.S., University of Michigan.

Indiana Law Review

Volume 26

1993

Number 4

An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 1992*

KEVIN W. BETZ**

This Article statistically examines the Indiana Supreme Court's docket, dispositions, and voting in 1992. This is the second annual edition of this examination. Obviously, the Supreme Court's powers and duties go well beyond its opinions and acts on petitions, but this is at least one method by which to understand what the most powerful judicial body¹ in our State is doing.

By any standard, this court is doing quite a lot.² Overall, it disposed of an unprecedented 1,058 matters, including criminal cases, civil cases,

* The Tables presented in this Article are patterned after the annual statistics of the United States Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court 1967 Term*, 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

** Associate, Krieg DeVault Alexander & Capehart, Indianapolis. Law Clerk for Chief Justice Randall T. Shepard, Indiana Supreme Court, 1988-1990. B.A., 1982, Indiana University; M.S., 1984, Northwestern University; J.D., 1988, Indiana University School of Law—Bloomington. I thank Krieg DeVault Alexander & Capehart for its gracious willingness to devote the time, energy, and resources of its law firm to allow such a project as this to be accomplished. The individual at Krieg DeVault to whom I am deeply grateful is Andrew T. Deibert. Without Andy, this edition would not have been completed. I am also appreciative of the assistance of Kimberly A. Bradford, the Supreme Court Administrator, and Karyn D. Graves of that office; Susan B. Horton and Patti K. Warthen of Krieg DeVault also assisted in this project. Finally, credit for the idea goes to Chief Justice Shepard. As is appropriate, the judge gets the credit for the idea, but, of course, any errors or omissions belong to his former law clerk. I hope this review is of value to academic researchers as well as practitioners.

1. Since 1817, when the Indiana Supreme Court began building the legal foundation of this State, all of the court's members have been white, Christian males except one. Thanks to Justice Givan, I am correcting a misstatement of this point in last year's edition. Justice Givan pointed out that Isadore Levine who was Jewish served on the Court.

2. See *High Court Has Unprecedented Year*, 36 Res Gestae 409 (1993).

original actions, petitions for rehearing, disciplinary matters, and bar exam petitions.³ Besides deciding a record number of matters, the court also has eliminated its backlog, allowing for the most expedient review of cases in at least two decades.⁴ Some cases are decided by the court within one month of being fully briefed.

The court handed down 185 majority opinions this year, eighty-seven on criminal cases and ninety-eight⁵ on civil cases. Although complete records are not kept on this point, this is likely the first year any current member of the court has seen civil opinions outnumber criminal opinions, which goes back to 1968 when Justice Roger DeBruler joined the court.⁶ In 1991, the court handed down 212 opinions, 134 criminal and seventy-eight civil.⁷

The following is a brief description of the highlights from each Table.

TABLE A. Justice Jon Krahulik wrote fifty-two opinions, the most opinions written by any justice, and he wrote the most civil opinions

3. See SUPREME COURT OF IND. PROGRESS REPORT—1992 CASE INVENTORIES & DISPOSITION SUMMARY (available at the office of the Supreme Court Administrator). According to the Report, the court acted upon 453 petitions to transfer for civil cases and denied 387 (85%), dismissed 10 (2%), and assigned 54 (12%) for majority opinions. The court acted upon 438 petitions to transfer for criminal cases and denied 405 (92%), assigning a total of 33 (8%) for majority opinions.

Individually, Chief Justice Shepard disposed of 63 matters, Justice DeBruler 43, Justice Givan 107, Justice Dickson 46, and Justice Krahulik 86. These numbers are significantly lower than last year because the court has adopted a new method by which it decides upon petitions to transfer for criminal cases. These petitions are no longer assigned to an individual justice. They are now sent to each justice on a weekly basis and the court then meets to discuss and vote upon the petitions collectively. Previously, the court gave credit to an individual justice for analyzing and making a recommendation on a petition to transfer for a criminal case.

Petitions to transfer for civil cases are first analyzed by the Supreme Court Administrator and staff attorneys in that office who then send the petition and briefs along with a memorandum discussing the issues as well as a recommendation on whether the court should grant transfer. The court also issued four opinions on petitions for rehearing and denied 44 such petitions without opinion. The court granted two petitions for rehearing: *Donegan v. Donegan*, 605 N.E.2d 132 (Ind. 1992); *Evans v. State*, 598 N.E.2d 516 (Ind. 1992). During 1992, the Court conducted 25 oral arguments, according to the office of the Supreme Court Administrator.

4. See *supra* note 2.

5. This includes civil cases such as Writs of Mandamus and disciplinary matters that are decided by the Court pursuant to its original jurisdiction and are not brought to the Court pursuant to a petition to transfer. See IND. R. P. FOR ORIG. ACTIONS.

6. See *supra* note 2; see generally Chief Justice Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669 (1988).

7. See Kevin W. Betz, *An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 1991*, 25 IND. L. REV. 1469, 1473 (1992).

by more than double than that of any of the other justices. He was also the justice least likely to dissent. Justice Richard Givan was the most likely to dissent with forty dissenting opinions or votes. Justice Givan was also the author of the most criminal opinions.

In 1992, the court issued thirty-two fewer opinions overall than in 1991, but ruled on twenty more civil opinions. The court dropped from forty-nine to twenty-three in its number of concurrences but had the same number of dissents at ninety-four.

TABLE B-1. Justices Randall Shepard, Brent Dickson and Krahulik are aligned with each other in 86% of civil opinions. The two members of the court most aligned on civil opinions were Justices Dickson and Krahulik at 88.8%, and Justices Shepard and Krahulik were in agreement in 87.5% of civil opinions. The two least aligned justices with each other were Justices DeBruler and Givan at 58.8%, which was almost precisely their percentage of alignment in 1991 at 58.4%. Justice Krahulik was the most aligned with all of his colleagues in civil cases, averaging 82.8% agreement with each of his fellow justices, just barely ahead of Justice Dickson at 82.0%.

Overall, the court was more agreeable on civil cases than in 1991. In 1992, the court had alignments between justices of greater than 85%, whereas in the previous year the most alignment between two justices was about 76%.

TABLE B-2. Justices Shepard and Krahulik were the two most aligned in criminal cases at 88.5%, disagreeing in only ten opinions out of eighty-seven possibilities. Justices Givan and DeBruler are the least aligned in criminal cases, agreeing only 58.6% of the time in this area. Chief Justice Shepard was the most aligned with each member of the court in criminal matters, averaging 82.8% alignment, just ahead of Justice Krahulik at 81.0%.

TABLE B-3. For all opinions—civil and criminal—Justices Shepard, Dickson, and Krahulik formed the majority of the court in just over 80% of opinions in 1992. This is very similar to 1991. Another similarity between 1992 and 1991 is that Justices DeBruler and Givan are the least aligned two justices with each other at 58.7%. The two most aligned members of the court were Justices Shepard and Krahulik at 88.0%.

Justice Krahulik is the most frequently aligned on average with each member of the court, just ahead of Justices Shepard and Dickson.

TABLE C. About 54% of the court's opinions were unanimous or unanimous with a concurrence. The court had at least one dissent in about 46% of its opinions, which is about 10% more than in the previous year.

TABLE D. Of the 185 opinions, twenty-five were decided by a 3-2 vote. Justices Shepard and Krahulik were most often in a three-justice majority on seventeen and nineteen occasions, respectively. Justice

Krahulik was the author of the most 3-2 opinions with nine, and Justice Givan was next with five. Justice Dickson was in a three-justice majority thirteen times in 1992; he was in a 3-2 majority the most times in 1991 at twenty. Justices DeBruler and Givan were in a three-justice majority on fourteen and twelve occasions, respectively. Of the twenty-five split opinions, twelve were criminal cases and thirteen were civil.

Interestingly, Justices Shepard, Dickson, and Krahulik who are aligned most of the time overall, did not make up any three-justice majority for decisions rendered by full opinion.

TABLE E. Of the sixty-five civil cases accepted for transfer and handed down in 1992, fifty-six (86%) were either reversed or vacated. Of the twenty-eight criminal cases accepted for transfer and issued in 1992, twenty-two (79%) were either reversed or vacated. Of the fifty-nine criminal cases that were automatically appealed to the court, forty-two (71%) were affirmed. Last year 90% of direct criminal appeals were affirmed.

TABLE F. This is a Table of the number of opinions in selected areas in which the court provided substantive analysis. The court wrote opinions on twenty attorney disciplinary cases; it only issued nine opinions in this area last year. The court reviewed nine death penalty sentences, affirming five and reversing four.

TABLE A

OPINIONS^a

OPINIONS OF COURT ^b				CONCURRENCES ^c			DISSENTS ^d		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J. ^e	19	15	34	0	1	1	2	9	11
DeBruler	10	4	14	7	0	7	17	13	30
Givan ^e	32	10	42	1	2	3	17	23	40
Dickson	3	13	16	6	1	7	5	4	9
Krahulik	21	31	52	4	1	5	2	2	4
Per Curiam	2	25	27						
Total	87	98	185	18	5	23	43	51	94

^a These are opinions and votes on opinions by each justice and in Per Curiam in the 1992 term. The Indiana Supreme Court is unique because it is the only Supreme Court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The Chief Justice does not have any power to control the assignments other than as a member of the majority. See Melinda Gann Hall, *Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. *Id.* at 210.

^b Plurality opinions that announce the judgment of the court are counted as opinions of the court. This is only a counting of full opinions written by each justice. It includes opinions on civil, criminal, and original actions and disciplinary matters. It does not include rehearing opinions, nor does it include the Per Curiam opinions given credit to each justice by the Supreme Court of Indiana Progress Report. The Per Curiam opinions are released publicly with no justice named as the author, but the Report gives credit to the justice who actually wrote the opinion. For the purposes of this Table, Per Curiam opinions are not counted for an individual justice because the public has no method of knowing which justice wrote the opinion.

^c This includes both written concurrences and votes to concur in result only.

^d This includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

^e Chief Justice Shepard did not participate in two opinions. *Wehling v. Citizens National Bank*, 586 N.E.2d 840 (Ind. 1992); *Malachowski v. Bank One, Indianapolis*, 590 N.E.2d 559 (Ind. 1992). Justice Givan did not participate in one opinion. *Barco Beverage Corp. v. Indiana Alcoholic Beverage Comm.*, 595 N.E.2d 250 (Ind. 1992).

TABLE B-1
VOTING ALIGNMENTS FOR CIVIL CASES^f

		Krahulik	Dickson	Givan	DeBruler	Shepard
Shepard	O	84	81	73	63	---
	S	0	0	1	0	---
	D	84	81	74	63	---
	N	96	96	95	96	---
	P	87.5 %	84.4 %	77.9 %	65.6 %	---
DeBruler	O	79	80	56	---	63
	S	0	0	1	---	0
	D	79	80	57	---	63
	N	98	98	97	---	96
	P	80.6 %	81.6 %	58.8 %	---	65.6 %
Givan	O	71	70	---	56	73
	S	1	1	---	1	1
	D	72	71	---	57	74
	N	97	97	---	97	95
	P	74.2 %	73.2 %	---	55.8 %	77.9 %
Dickson	O	87	---	70	80	81
	S	0	---	1	0	0
	D	87	---	71	80	81
	N	98	---	97	98	96
	P	88.8 %	---	73.2 %	81.6 %	84.4 %
Krahulik	O	---	87	71	79	84
	S	---	0	1	0	0
	D	---	87	72	79	84
	N	---	98	97	98	96
	P	---	88.8 %	74.2 %	80.6 %	87.5 %

^f This Table records the number of times that one justice voted with another in full-opinion decisions, including Per Curiam, for only civil cases. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

- "O" represents the number of times that the two justices agreed in opinions of the Court or opinions announcing the judgment of the Court.
- "S" represents the number of times the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
- "D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
- "N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
- "P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE B-2
VOTING ALIGNMENTS FOR CRIMINAL CASES[§]

		Krahulik	Dickson	Givan	DeBruler	Shepard
Shepard	O	77	73	69	64	---
	S	0	1	1	3	---
	D	77	74	70	67	---
	N	87	87	87	87	---
	P	88.5%	85.1%	80.5%	77.0%	---
DeBruler	O	66	64	47	---	64
	S	3	4	4	---	3
	D	69	68	51	---	67
	N	87	87	87	---	87
	P	79.3%	78.2%	58.6%	---	77.0%
Givan	O	63	61	---	47	69
	S	1	2	---	4	1
	D	64	63	---	51	70
	N	87	87	---	87	87
	P	73.6%	72.4%	---	58.6%	80.5%
Dickson	O	71	---	61	64	73
	S	1	---	2	4	1
	D	72	---	63	68	74
	N	87	---	87	87	87
	P	82.8%	---	72.4%	78.2%	85.1%
Krahulik	O	---	71	63	66	77
	S	---	1	1	3	0
	D	---	72	64	69	77
	N	---	87	87	87	87
	P	---	82.8%	73.6%	79.3%	88.5%

[§] This Table records the number of times that one justice voted with another in full-opinion decisions, including Per Curiam, for only criminal cases. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

"O" represents the number of times that the two justices agreed in opinions of the Court or opinions announcing the judgment of the Court.
"S" represents the number of times the two justices agreed in separate opinions, including agreements in both concurrences and dissents.
"D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.
"N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.
"P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE B-3
VOTING ALIGNMENTS FOR ALL CASES^h

		Krahulik	Dickson	Givan	DeBruler	Shepard
Shepard	O	161	154	142	127	---
	S	0	1	2	3	---
	D	161	155	144	130	---
	N	183	183	182	183	---
	P	88.0 %	84.7 %	79.1 %	71.0 %	---
DeBruler	O	145	144	103	---	127
	S	3	4	5	---	3
	D	148	148	108	---	130
	N	185	185	184	---	183
	P	80.0 %	80.0 %	58.7 %	---	71.0 %
Givan	O	134	131	---	103	142
	S	2	3	---	5	2
	D	136	134	---	108	144
	N	184	184	---	184	182
	P	73.9 %	72.8 %	---	58.7 %	79.1 %
Dickson	O	158	---	131	144	154
	S	1	---	3	4	1
	D	159	---	134	148	155
	N	185	---	184	185	183
	P	85.9 %	---	72.8 %	80.0 %	84.7 %
Krahulik	O	---	158	134	145	161
	S	---	1	2	3	0
	D	---	159	136	148	161
	N	---	185	184	185	183
	P	---	85.9 %	73.9 %	80.0 %	88.0 %

^h This Table records the number of times that one justice voted with another in full-opinion decisions, including Per Curiam, for all cases. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed only in the result of the case or wrote separate opinions revealing little philosophical disagreement.

"O" represents the number of times that the two justices agreed in opinions of the Court or opinions announcing the judgment of the Court.

"S" represents the number of times the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

"D" represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

"N" represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

"P" represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing "D" by "N."

TABLE C

UNANIMITYⁱ

Unanimous ^j			Unanimous With Concurrence ^k			Opinions With Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
36	51	87 (47%)	12	1	13 (7%)	38	47	85 (46%)	185

ⁱ This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and concur, it is still considered unanimous. It also tracks the percent of opinions with concurrence and opinions with dissent.

^j A decision is considered unanimous only when all justices participating in the case voted to concur in the court's opinion as well as its judgment. When one or more justices concurred in the result but not in the opinion, the case is not considered unanimous.

^k A decision is listed in this column if one or more justices concurred in the result but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D
3-2 DECISIONS¹

Justices Constituting the Majority	Number of Opinions ^m
1. Shepard, DeBruler, Givan	1
2. Shepard, DeBruler, Dickson	2
3. Shepard, DeBruler, Krahulik	4
4. Shepard, Givan, Dickson	3
5. Shepard, Givan, Krahulik	7
6. Shepard, Dickson, Krahulik	0
7. DeBruler, Givan, Krahulik	0
8. DeBruler, Dickson, Krahulik	7
9. Givan, Dickson, Krahulik	1
Total ⁿ	25

¹ This Table concerns only decisions rendered by full opinion. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court. The order of the justices' names is based on the tradition of the court, which is placing the Chief Justice first and then following the seniority of the justices.

^m This column lists the number of times each three-justice group constituted the majority in a 3-2 decision.

- ⁿ The 1992 term's 3-2 decisions were:
1. **Shepard, DeBruler, Givan:** *Timmons v. State*, 584 N.E.2d 1108 (Ind. 1992) [DeBruler].
 2. **Shepard, DeBruler, Dickson:** *Taggart v. State*, 595 N.E.2d 256 (Ind. 1992) [DeBruler]; *Department of Pub. Welfare v. Couch*, 605 N.E.2d 165 (Ind. 1992) [Dickson].
 3. **Shepard, DeBruler, Krahulik:** *Seifert v. Bland*, 587 N.E.2d 1317 (Ind. 1992) [DeBruler]; *State v. Snyder*, 594 N.E.2d 783 (Ind. 1992) [Krahulik]; *Evans v. State*, 598 N.E.2d 516 (Ind. 1992) [DeBruler]; *Jackson v. State*, 597 N.E.2d 950 (Ind. 1992) [Shepard], *cert. denied*, 113 S. Ct. 1424 (1993).
 4. **Shepard, Givan, Dickson:** *State ex rel. Indianapolis Police Pension Fund v. Marion Superior Court, Civil Division, Room VII*, 593 N.E.2d 193 (Ind. 1992) [Givan]; *Morse v. State*, 593 N.E.2d 194 (Ind. 1992) [Givan]; *Mickens v. State*, 596 N.E.2d 1379 (Ind. 1992) [Shepard].
 5. **Shepard, Givan, Krahulik:** *Barger v. State*, 587 N.E.2d 1304 (Ind. 1992) [Shepard], *aff'd*, 1993 WL 112073 (7th Cir. Apr. 13, 1993) (affirming denial of habeas corpus); *Bane v. State*, 587 N.E.2d 97 (Ind. 1992) [Krahulik]; *Oelling v. Rao*, 593 N.E.2d 189 (Ind. 1992) [Shepard]; *Potts v. State*, 594 N.E.2d 438 (Ind. 1992) [Givan], *cert. denied*, 1993 WL 59047 (U.S. Apr. 19, 1993); *McGowan v. State*, 599 N.E.2d 589 (Ind. 1992) [Givan]; *Culbertson v. Mernitz*, 602 N.E.2d 98 (Ind. 1992) [Krahulik]; *Griffith v. Jones*, 602 N.E.2d 107 (Ind. 1992) [Krahulik].
 6. **Shepard, Dickson, Krahulik:** None.
 7. **DeBruler, Givan, Krahulik:** None.
 8. **DeBruler, Dickson, Krahulik:** *Smith v. Convenience Store Distribution Co.*, 583 N.E.2d 735 (Ind. 1992) [Krahulik]; *Proctor v. State*, 584 N.E.2d 1089 (Ind. 1992) [Krahulik]; *Castor v. State*, 587 N.E.2d 1281 (Ind. 1992) [Krahulik]; *Citizens Action Coalition, Inc. v. Public Serv. Co.*, 595 N.E.2d 255 (Ind. 1992) [Per Curiam]; *Terre Haute Regional Hosp., Inc.*

v. Trueblood, 600 N.E.2d 1358 (Ind. 1992) [Krahulik]; In Re: Cawley, 602 N.E.2d 1022 (Ind. 1992) [Per Curiam]; Walker v. Rinck, et al., 604 N.E.2d 591 (Ind. 1992) [Krahulik].

9. **Givan, Dickson, Krahulik:** Hudson v. McClaskey, 597 N.E.2d 308 (Ind. 1992) [Givan].

TABLE E
DISPOSITION OF CASES REVIEWED BY TRANSFER
AND DIRECT APPEALS^o

	Reversed	Vacated ^p	Affirmed	Total
Civil Opinions Accepted for Transfer	14 (21%)	42 (65%)	9 (14%)	65
Direct Civil Appeals	2 (40%)	1 (20%)	2 (40%)	5
Criminal Opinions Accepted for Transfer	10 (36%)	12 (43%)	6 (21%)	28
Direct Criminal Appeals	13 (22%)	4 (7%)	42 (71%)	59
Total	39 (25%)	59 (37%)	59 (37%)	157 ^q

^o Direct criminal appeals are cases in which the trial court imposed a sentence of greater than 50 years. *See* IND. CONST. art. 7, § 4. Thus, direct criminal appeals are those directly from the trial court. A civil appeal may also be direct from the trial court. *See* IND. APP. R. 4(A). All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. *See* IND. APP. R. 11(B). The Court's transfer docket, especially civil cases, has substantially increased in the past three years. *See* Chief Justice Randall T. Shepard, *Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499 (1991).

^p Generally, the term "vacate" is used by the Indiana Supreme Court when it is reviewing a Court of appeals opinion, while the term "reverse" is used when the Court overrules a trial court decision. A point to consider in reviewing this Table is that the Court technically "vacates" every Court of appeals opinion that is accepted for transfer, but may only disagree with a small portion of the reasoning and still agree with the result. *See* IND. APP. R. 11(B)(3).

^q This does not include 20 attorney discipline opinions, two judicial discipline opinions, four Writs of Mandamus or Prohibition, and two miscellaneous cases. These opinions were not reversed, vacated, or affirmed.

TABLE F
SUBJECT AREAS OF SELECTED DISPOSITIONS
WITH FULL OPINIONS^f

	Number
Original Actions	
• Writs of Mandamus or Prohibition	4 ^s
• Attorney Discipline	20 ^t
• Judicial Discipline	2 ^u
Criminal	
• Death Penalty	9 ^v
• Fourth Amendment or Search and Seizure	9 ^w
• Reserved Questions of Law	1 ^x
Emergency Appeals to the Supreme Court	1 ^y
Trusts, Estates, or Probate	3 ^z
Real Estate or Real Property	11 ^{aa}
Landlord-Tenant	1 ^{bb}
Divorce or Child Support	9 ^{cc}
Children In Need of Services (CHINS)	1 ^{dd}
Paternity	3 ^{ee}
Product Liability or Strict Liability	0
Negligence or Personal Injury	11 ^{ff}
Indiana Tort Claims Act	3 ^{gg}
Statute of Limitations or Statute of Repose	10 ^{hh}
Tax, Department of State Revenue, or State Board of Tax Commissioners	3 ⁱⁱ
Contracts	11 ^{jj}
Corporate Law or the Indiana Business Corporation Law	0
Uniform Commercial Code	1 ^{kk}
Banking Law	5 ^{ll}
Employment Law	4 ^{mm}
First Amendment, Open Door Law, or Public Records Law	0
Indiana Constitution	9 ⁿⁿ

^r This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 1992. It is also a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. A citation list is provided in a footnote for each area.

^s State *ex rel.* Indianapolis Police Pension Fund v. Marion Superior Court, Civil Division, Room VII, 593 N.E.2d 193 (Ind. 1992); State *ex rel.* Long v. Warrick Circuit Court, 591

N.E.2d 559 (Ind. 1992); *State ex rel. Eilts v. Jasper Circuit Court*, 583 N.E.2d 740 (Ind. 1992); *Van Meter v. Heath*, 602 N.E.2d 143 (Ind. 1992).

^t *In Re Charos*, 585 N.E.2d 1334 (Ind. 1992); *In Re Vogler*, 587 N.E.2d 678 (Ind. 1992); *In Re Seat*, 588 N.E.2d 1262 (Ind. 1992); *In Re Smith*, 588 N.E.2d 1268 (Ind. 1992); *In Re Fogle*, 590 N.E.2d 572 (Ind. 1992); *In Re Kieser*, 591 N.E.2d 560 (Ind. 1992); *In Re Shaul*, 592 N.E.2d 687 (Ind. 1992); *In Re Relphorde*, 596 N.E.2d 903 (Ind. 1992); *In Re Frosch*, 597 N.E.2d 310 (Ind. 1992); *In Re Walker*, 597 N.E.2d 1271, *modified*, 601 N.E.2d 327 (Ind. 1992); *In Re Henry*, 599 N.E.2d 602 (Ind. 1992); *In Re Reed*, 599 N.E.2d 601 (Ind. 1992); *In Re Gutman*, 599 N.E.2d 604 (Ind. 1992); *In Re Gielow*, 601 N.E.2d 340 (Ind. 1992); *In Re Jarrett*, 602 N.E.2d 131 (Ind. 1992); *In Re Cawley*, 602 N.E.2d 1022 (Ind. 1992); *In Re Wojihoski-Shaler*, 603 N.E.2d 1347 (Ind. 1992); *In Re Levinson*, 604 N.E.2d 599 (Ind. 1992); *In Re Ortiz*, 604 N.E.2d 602 (Ind. 1992); *In Re Stover-Pock*, 604 N.E.2d 606 (Ind. 1992).

^u *In Re Drury*, 602 N.E.2d 1000 (Ind. 1992); *In Re Katic*, 595 N.E.2d 259 (Ind. 1992).

^v The Indiana Supreme Court reviewed nine death penalty sentences and affirmed five and reversed four. *Matheney v. State*, 583 N.E.2d 1202 (Ind. 1992), *cert. denied*, 112 S. Ct. 2320 (1992); *Johnson v. State*, 584 N.E.2d 1092 (Ind. 1992), *cert. denied*, 113 S. Ct. 155 (1992); *Castor v. State*, 587 N.E.2d 1281 (Ind. 1992); *Potts v. State*, 594 N.E.2d 438 (Ind. 1992), *cert. denied*, 1993 WL 59047 (Apr. 19, 1993); *Jackson v. State*, 597 N.E.2d 950 (Ind. 1992), *cert. denied*, 113 S. Ct. 1424 (1993); *Evans v. State*, 598 N.E.2d 516 (Ind. 1992); *Landress v. State*, 600 N.E.2d 938 (Ind. 1992); *Rouster v. State*, 600 N.E.2d 1342 (Ind. 1992); *Baird v. State*, 604 N.E.2d 1170 (Ind. 1992).

^w *Roberts v. State*, 599 N.E.2d 595 (Ind. 1992); *Dolliver v. State*, 598 N.E.2d 525 (Ind. 1992); *Jackson v. State*, 597 N.E.2d 950 (Ind. 1992), *cert. denied*, 113 S. Ct. 1424 (1993); *Wright v. State*, 593 N.E.2d 1192 (Ind. 1992), *cert. denied*, 113 S. Ct. 605 (1992); *Chappel v. State*, 591 N.E.2d 1011 (Ind. 1992); *Geimer v. State*, 591 N.E.2d 1016 (Ind. 1992); *Everroad v. State*, 590 N.E.2d 567 (Ind. 1992); *Utley v. State*, 589 N.E.2d 232 (Ind. 1992), *cert. denied*, 113 S. Ct. 991 (1992); *Taylor v. State*, 587 N.E.2d 1293 (Ind. 1992).

^x *Lannan v. State*, 600 N.E.2d 1334 (Ind. 1992).

^y *Tyson v. State*, 593 N.E.2d 175 (Ind. 1992).

^z *State ex rel. Eilts v. Jasper Circuit Court*, 583 N.E.2d 740 (Ind. 1992); *Malachowski v. Bank One, Indianapolis*, 590 N.E.2d 559 (Ind. 1992).

^{aa} *McAdams v. Dorothy Edwards Realtors, Inc.*, 604 N.E.2d 607 (Ind. 1992); *Campbell v. Vencel*, 604 N.E.2d 601 (Ind. 1992); *Hudson v. McClaskey*, 597 N.E.2d 308 (Ind. 1992); *Lawyers Title Ins. Corp. v. Pokraka*, 595 N.E.2d 244 (Ind. 1992); *Rossmann v. Dunson*, 594 N.E.2d 789 (Ind. 1992); *Culver Cove Realty v. Wayne's Realty*, 594 N.E.2d 782 (Ind. 1992); *Center Holding Co. v. Munco Associates*, 589 N.E.2d 220 (Ind. 1992); *Elizondo v. Read*, 588 N.E.2d 501 (Ind. 1992); *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840 (Ind. 1992); *Kohlman v. Blomberg*, 584 N.E.2d 566 (Ind. 1992); *Miller Reeder Co. v. Farmers State Bank*, 588 N.E.2d 506 (Ind. 1992).

^{bb} *Smith v. Syd's, Inc.*, 598 N.E.2d 1065 (Ind. 1992).

^{cc} *Donegan v. Donegan*, 605 N.E.2d 132 (Ind. 1992); *reh'g granted*, 586 N.E.2d 844; *In Re Paternity of S.R.I. W.R. v. H.I. and V.W.I.*, 602 N.E.2d 1014 (Ind. 1992); *Carr v. Carr*, 600 N.E.2d 943 (Ind. 1992); *Selke v. Selke*, 600 N.E.2d 100 (Ind. 1992); *Lamb v. Wenning*, 600 N.E.2d 96 (Ind. 1992); *Adoptive Parents of M.L.V. & A.L.V. v. Wilkens*, 598 N.E.2d 1054 (Ind. 1992); *State ex rel. Indianapolis Police Pension Fund v. Marion Superior Court, Civil Division, Room VII*, 593 N.E.2d 193 (Ind. 1992); *In Re Megan Renee Grissom, Tina Eason v. Danny Grissom*, 587 N.E.2d 114 (Ind. 1992); *In Re Marriage of Millar*, 593 N.E.2d 1182 (Ind. 1992).

^{dd} *S.E.S. v. Grant County Dep't. of Welfare*, 594 N.E.2d 447 (Ind. 1992).

^{ee} *In Re Paternity of S.R.I. W.R. v. H.I. and V.W.I.*, 602 N.E.2d 1014 (Ind. 1992); *Adoptive Parents of M.L.V. and A.L.V. v. Wilkens*, 598 N.E.2d 1054 (Ind. 1992); *In Re Megan Renee Grissom, Tina Eason v. Danny Grissom*, 587 N.E.2d 114 (Ind. 1992).

^{ff} *Department of Pub. Welfare v. Couch*, 605 N.E.2d 165 (Ind. 1992); *Sullivan v. American Casualty Co.*, 605 N.E.2d 134 (Ind. 1992); *White v. Allstate Ins. Co.*, 605 N.E.2d 141 (Ind. 1992); *Walker v. Rinck*, 604 N.E.2d 591 (Ind. 1992); *Barnes v. Barnes*, 603 N.E.2d 1337 (Ind. 1992); *State v. Rendleman*, 603 N.E.2d 1333 (Ind. 1992); *Terre Haute Regional Hosp. v. Trueblood*, 600 N.E.2d 1358 (Ind. 1992); *Stump v. Commercial Union*, 601 N.E.2d 327 (Ind. 1992); *Ingram v. Key*, 600 N.E.2d 95 (Ind. 1992); *Huffman v. Monroe County Community Sch. Corp.*, 588 N.E.2d 1264 (Ind. 1992); *Seifert v. Bland*, 587 N.E.2d 1317 (Ind. 1992); *Smith v. Convenience Store Distributing Co.*, 583 N.E.2d 735 (Ind. 1992).

^{gg} *State v. Rendleman*, 603 N.E. 1333 (Ind. 1992); *City of Valparaiso v. Edgecomb*, 587 N.E.2d 96 (Ind. 1992); *Buckley v. Standard Inv. Co.*, 586 N.E.2d 843 (Ind. 1992).

^{hh} *Walker v. Rinck*, 604 N.E.2d 591 (Ind. 1992); *Miller v. Terre Haute Regional Hosp.*, 603 N.E.2d 861 (Ind. 1992); *State v. Rendleman*, 603 N.E.2d 1333 (Ind. 1992); *State v. Hartman*, 602 N.E.2d 1011 (Ind. 1992); *Willner v. State*, 602 N.E.2d 507 (Ind. 1992); *Lawyers Title Ins. Corp. v. Pokraka*, 595 N.E.2d 244 (Ind. 1992); *State v. Scales*, 593 N.E.2d 181 (Ind. 1992); *Madlem v. Arko*, 592 N.E.2d 686 (Ind. 1992); *Malachowski v. Bank One, Indianapolis*, 590 N.E.2d 559 (Ind. 1992); *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840 (Ind. 1992).

ⁱⁱ All three of these appeals were transferred from the Tax Court, and the Supreme Court affirmed the Tax Court on each appeal. *Indiana Dep't of State Revenue v. General Motors Corp.*, 599 N.E.2d 588 (Ind. 1992); *Indiana Dep't of State Revenue v. Caylor-Nickel Clinic*, 587 N.E.2d 1311 (Ind. 1992); *Indiana Dep't of State Revenue v. Johnson County Farm Bureau Coop. Assoc., Inc.*, 585 N.E.2d 1336 (Ind. 1992).

^{jj} *McAdams v. Dorothy Edwards Realtors, Inc.*, 604 N.E.2d 607 (Ind. 1992); *Campbell v. Vencel*, 604 N.E.2d 601 (Ind. 1992); *Stump v. Commercial Union*, 601 N.E.2d 327 (Ind. 1992); *Hudson v. McClaskey*, 597 N.E.2d 308 (Ind. 1992); *Indiana Dep't of Ins. v. Zenith Reinsurance Co., Ltd.*, 596 N.E.2d 228 (Ind. 1992); *Lawyers Title Ins. Corp. v. Pokraka*, 595 N.E.2d 244 (Ind. 1992); *Egley v. Blackford County Dep't of Public Welfare*, 592 N.E.2d 1232 (Ind. 1992); *Metro Holding Co. v. Mitchell*, 589 N.E.2d 217 (Ind. 1992); *Huffman v. Monroe County Community Sch. Corp.*, 588 N.E.2d 1264 (Ind. 1992); *Tate v. Secura Ins.*, 587 N.E.2d 665 (Ind. 1992); *Kohlman v. Blomberg*, 584 N.E.2d 566 (Ind. 1992).

^{kk} *Ambassador Fin. Servs., Inc. v. Indiana National Bank*, 605 N.E.2d 746 (Ind. 1992).

^{ll} *Ambassador Fin. Servs., Inc. v. Indiana National Bank*, 605 N.E.2d 746 (Ind. 1992); *Malachowski v. Bank One, Indianapolis*, 590 N.E.2d 559 (Ind. 1992); *Miller Reeder Co. v. Farmers State Bank*, 588 N.E.2d 506 (Ind. 1992); *Elizondo v. Read*, 588 N.E.2d 501 (Ind. 1992); *Wehling v. Citizens National Bank*, 586 N.E.2d 840 (Ind. 1992).

^{mm} *Bals v. Verduzco*, 600 N.E.2d 1353 (Ind. 1992); *Stump v. Commercial Union*, 601 N.E.2d 327 (Ind. 1992); *Baltimore and Ohio R.R. Co. v. Taylor*, 600 N.E.2d 543 (Ind. 1992); *City of Indianapolis v. Hargis*, 588 N.E.2d 496 (Ind. 1992).

ⁿⁿ *Campbell v. Criterion Group*, 605 N.E.2d 150 (Ind. 1992); *Baird v. State*, 604 N.E.2d 1170 (Ind. 1992); *State v. Rendleman*, 603 N.E.2d 1333 (Ind. 1992); *Bellmore v. State*, 602 N.E.2d 111 (Ind. 1992); *Dolliver v. State*, 598 N.E.2d 525 (Ind. 1992); *Gallagher v. Indiana State Election Bd.*, 598 N.E.2d 510 (Ind. 1992), *cert. denied*, 113 S. Ct. 1051 (1993); *Roche v. State*, 596 N.E.2d 896 (Ind. 1992); *Tyson v. State*, 593 N.E.2d 175 (Ind. 1992); *Woods v. State*, 583 N.E.2d 1211 (Ind. 1992).

The Americans with Disabilities Act of 1990: Overview and Analysis

BRENT EDWARD KIDWELL*

INTRODUCTION

The Americans with Disabilities Act of 1990 (ADA) was enacted to provide equality of opportunity to individuals with disabilities.¹ To accomplish this, the ADA prohibits discrimination against individuals with disabilities, creates a mechanism to enforce this prohibition, and grants extensive authority to the federal government to ensure ADA goals are accomplished.

The ADA is divided into five sections, which prohibit discrimination against individuals with disabilities in employment, public services and transportation, public accommodations, and telecommunications. Because of this breadth, most businesses and public agencies will feel the effects of the ADA.

This Article provides only a general overview of the ADA.² General explanations of the law are offered together with relevant provisions of regulations implementing the Act. This Article also provides citations to the Act, regulations, court decisions, and other secondary materials in an attempt to compile the vast resources available to the practitioner as a basis for ADA interpretation and implementation.

Organizationally, this Article tracks the ADA. Section I concerns "who" is protected by the ADA. Section II analyzes the employment provisions of the ADA, and section III concerns those provisions applicable to public or governmental entities. Next, ADA rules concerning accessibility to facilities and public accommodations are explained in Section IV. Finally, Section V discusses methods of enforcement and remedies for violations.

I. WHO IS PROTECTED BY THE ADA

The threshold issue under the ADA is to determine "who" is protected.³ This is answered by a somewhat unhelpful phrase: Only "qualified

* Law clerk to the Hon. John Tinder, Judge, United States District Court for the Southern District of Indiana; B.A., 1990, Indiana University; J.D., 1993, Indiana University School of Law, Indianapolis.

1. 42 U.S.C. § 12101 (Supp. 1991).

2. For a comprehensive symposium on issues arising under the ADA, see Dick Thornburgh, *The Americans with Disabilities Act: What it Means to All Americans*, 64 *TEMPLE L. REV.* 375 (1991) and related articles in the same issue.

3. Under the ADA, this determination is complex and difficult. Indeed, errors

individuals with disabilities'' are protected by the ADA.⁴ This phrase creates a two-pronged test: (1) Does the individual has a disability and, if so, (2) is that individual with the disability ''qualified?''

A. Individual with a Disability

A person is an individual with a disability if one of three tests are satisfied.⁵ First, a person is disabled if he or she has a ''physical or mental impairment that substantially limits one or more of their major life activities.'' ⁶ Impairments satisfying this definition include:⁷

- Orthopedic, visual, speech, and hearing impairments
- Epilepsy
- Multiple sclerosis
- Heart disease
- Mental retardation
- Specific learning disabilities
- Tuberculosis
- Alcoholism
- Cerebral palsy
- Muscular dystrophy
- Cancer
- Diabetes
- Emotional illness
- HIV disease⁸
- Drug addiction⁹

Conversely, certain conditions are not considered sufficient impairments to merit ADA protection:¹⁰

- Pregnancy
- Homosexuality or bisexuality
- Kleptomania
- Compulsive gambling
- Young or old age
- Transvestitism
- Exhibitionism or voyeurism
- Pedophilia
- Pyromania
- Gender identity disorders

in this determination and the resulting failures to afford ADA protections could expose an employer or other entity to liability. The following discussion provides general guidelines to determine who is an individual with a disability protected by ADA. However, a covered entity should ensure its programs, policies, and facilities comply with the ADA because a general policy of nondiscrimination promises the greatest protection under the ADA.

4. 42 U.S.C. § 12112(a) (Supp. 1991).

5. *Id.* § 12102(2). The ADA avoids the term ''disabled individual,'' instead opting for the more appropriate phrase ''individual with a disability.'' This is intended to convey the message that people are not disabled, but are merely encumbered with disabilities.

6. *Id.* § 12102(2)(A).

7. See 28 C.F.R. § 35.104 (1992). Although this regulation discusses ''disability'' in relation to public entities, the examples are relevant generally to determining disabilities under all portions of the ADA.

8. The protections afforded by the ADA for persons diagnosed with AIDS is currently of great interest to AIDS groups. See generally 9 Ben. Today (BNA) 348 (Oct. 30, 1992).

9. The Institute for a Drug-Free Workplace has published a guidebook which specifically addresses ADA compliances when alcoholics and drug addicts are present in the workplace. The book is available from the Institute by calling (202) 842-7400.

10. See 28 C.F.R. § 35.104 (1992).

Likewise, trivial impairments, impairments short in duration, or physical characteristics are not considered disabilities. Thus, an individual with an eye infection or who is left handed is not an individual with a disability.

Second, a person is an individual with a disability if they have a record of such an impairment.¹¹ Under this definition, a person with a history of mental or emotional illness, heart disease, or cancer is protected as if the person is currently disabled by the condition.¹² By defining disability in this manner, a covered entity cannot discriminate based on a prior history of a disability when the individual is not currently suffering from the impairment.

Lastly, a person is an individual with a disability if they are *regarded* as having a physical or mental impairment that is considered a disability.¹³ This protects a person with a physical or mental impairment which does not limit a major life activity, but who is *treated* as having such a limitation.¹⁴ Further, a person with an impairment that limits a major life activity only as a result of the *attitude* of others toward the impairment is also protected. In addition, a person without an impairment but who is regarded as having an impairment is protected by the ADA.¹⁵

Common to each of these tests is a finding that a disability substantially limits a major life activity. A major life activity is one that an average person can perform with little or no difficulty,¹⁶ including walking, speaking, breathing, and standing.¹⁷ If any of these activities are substantially limited by a disability, the individual is a person with a disability under the ADA. Determining if a limitation is substantial requires an analysis of the effect of the limitation on the person.¹⁸

11. 42 U.S.C. § 12102(2)(B) (Supp. 1991).

12. S. REP. NO. 116, 101st Cong., 1st Sess. 22 (1989).

13. 42 U.S.C. § 12102(2)(C) (Supp. 1991).

14. S. REP. NO. 116, 101st Cong., 1st Sess. 24 (1989).

15. Example: A severe burn victim or obese person who is not substantially limited in a major life activity and who is discriminated against because an employer believes the person is unable to work is protected by the ADA. Such person is considered an individual with a disability. (This and other examples in this Article are liberally adapted from examples found in various federal regulations and other cited works. See e.g. 56 Fed. Reg. 35544, 35550 (July 26, 1991). However, no further citations will be given for the examples that follow.)

16. 29 C.F.R. § 1630.2(i) (1992). See also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT II-3 to 4 (1992) [hereinafter MANUAL].

17. 29 C.F.R. § 1630.2(i) (1992). See also MANUAL, *supra* note 16, at II-3 to 4.

18. 29 C.F.R. § 1630.2(j) (1992). The regulations set forth three factors to consider in determining if a major life activity is substantially limited: (1) The nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the actual or expected permanent or long-term impact of the disability. *Id.* § 1630.2(j)(2)(i)-(iii).

Temporary impairments with little or no long-term impact do not substantially limit a major life activity, and thereby prevent a disability finding.¹⁹

B. "Qualified" Individual with a Disability

Even if a person has a disability, and this disability substantially limits a major life activity, the protections of the ADA are not necessarily implicated. The person with a disability must be "qualified." The specific test applied depends upon which provisions of the ADA are being invoked. Because of the interrelated nature of the test and the antidiscrimination provisions particular to each Title of the ADA, a discussion of "qualified" individual is reserved for the pertinent Article sections below.²⁰

II. EMPLOYMENT PRACTICES

The first major area of regulation under the ADA relates to the private employment relationship. The nondiscrimination provisions of the employment section of the ADA apply to all "covered entities,"²¹ defined as an "employer."²² An employer is an organization engaged in commerce which employs a certain minimum number of employees.²³ Until July 25, 1994, the ADA applies only to employers with twenty-five or more employees. Thereafter, the ADA will be extended to employers who maintain fifteen or more employees.²⁴ These effective dates and employee thresholds apply only to private employers, with the employment provisions of the ADA immediately applying to government and public entities regardless of the number of employees.²⁵

A. Discrimination Prohibited

The general nondiscrimination rule of the ADA provides:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement,

19. MANUAL, *supra* note 16, at II-5.

20. For a discussion of "qualified" individual in the employment context, see *infra* note 27 and accompanying text; for the similar discussion regarding public and governmental entities, see *infra* note 106 and accompanying text.

21. 42 U.S.C. § 12112(a) (Supp. 1991).

22. *Id.* § 12111(2).

23. *Id.* § 12111(5)(A).

24. *Id.*

25. 28 C.F.R. § 35.140, app. A (1992). See *infra* note 103 and accompanying text.

or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.²⁶

Under this broad rule, the key issues are who is a “covered entity,” who is a “qualified individual with a disability,” and what is “discrimination.” Distinguishing which employers are subject to the ADA, that is, are denominated “covered entities,” is explained immediately above. The latter two issues, however, deserve careful analysis.

B. “Qualified Individual with a Disability”

The antidiscrimination rule protects only “qualified individuals with a disability” (QID).²⁷ A QID is: “[A]n individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”²⁸ By this definition, an employer is not required to hire or retain an individual with a disability who is unable to perform the “essential functions” of the position.

1. *Essential Functions.*—The ADA requires that consideration be given to the employer’s judgment as to which job functions are essential, acknowledging the business necessity of having an employee capable of performing required job tasks.²⁹ An essential function is a job task which is fundamental, as opposed to a task which is only marginally related to the position.³⁰ Whether a function is essential does not necessarily depend upon the specific duty in isolation, but rather the duty in the context of the total work environment.³¹ The essential function analysis focuses on the desired results of the job, not the means of attaining those results.³²

An employer’s written description of a job is considered evidence of the essential functions of the position, provided the employer prepares

26. 42 U.S.C. § 12112(a) (Supp. 1991).

27. *Id.*

28. *Id.* § 12111(8).

29. *Id.*

30. 29 C.F.R. § 1630.2(n), app. A (1992).

31. *Id.* Example: A person with epilepsy applies for a position as counselor at juvenile hall. After receiving a job offer, the offer is withdrawn because the person does not have a driver’s license. Driving is required in emergencies, such as taking a child to the hospital. However, it is only necessary that some of the counselors are able to drive, and it is not essential that all counselors be able to drive. On a given shift, another counselor who is able to drive could be assigned. Thus, having a driver’s license is not an essential function.

32. *Id.* Example: The postal service required postal clerks to be able to perform the job of mail distribution with both arms. The essential function of the job was found to be the ability to lift and carry mail. Thus, an employee with limited mobility in one arm who could lift and carry mail could perform the “essential function” of the position.

the description before advertising or interviewing for the job.³³ This description should be written in terms of the results required of a person performing the job, not in language indicating the manner of performance.³⁴ Although an employer's description is not conclusive as to the essential functions of a position, the employer's judgment would be considered evidence in a subsequent charge of discrimination.

The ADA does not prevent an employer from hiring or promoting the most qualified individual for a position.³⁵ To this end, the ADA does not impose quotas or other hiring goals on private employers.³⁶ Although the employer may require every employee to be qualified to perform the essential functions of a job, the ADA prevents an employer from not hiring or not promoting an individual because a disability prevents the person from performing a nonessential function. Further, an employer cannot make an adverse employment decision because an individual with a disability requires a reasonable accommodation to perform an essential job function.³⁷ If an individual with a disability is qualified to perform the essential functions of a job, with or without a reasonable accommodation, the employer may not premise any employment decision on an employee's disability.

Other specific evidence indicating that a particular aspect of the job is an essential function include: that the position exists to perform the

33. *Id.* § 1630.2(n)(3)(ii). A commercial computer software package is available to assist in creating, compiling, and storing job descriptions for ADA compliance. The package is available from Human Resources Management Services, Inc. by calling (317) 571-4230. See 58 Daily Lab. Rep. (BNA) A-21 (Mar. 25, 1992).

34. In preparing a job description, employers should avoid vague and undefined tasks and duties. For example, the phrase "other duties as assigned" should not be included in the description of the essential functions of the position. Other authorities suggest a job description should be divided into specific areas:

- (1) Physical and mental requirements,
- (2) Equipment needed,
- (3) Working conditions,
- (4) Supervisory control, and

(5) Output required. Equal Employment Opportunity Commission (EEOC) officials to warn against placing anything in a description that is not related to the job. See 107 Daily Lab. Rep. (BNA) A-1 (June 3, 1992) (providing this and other related information).

35. See H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 56 (1990).

36. Example: If an employer seeking a typist has two applicants, one with a disability who can type 50 words per minute and one without a disability who can type 75 words per minute, the employer may hire the faster typist.

37. The definition of "reasonable accommodation" will be discussed further *infra* at note 59 and accompanying text. Example: If two applicants for a typing position are both capable of typing 75 words per minute, but one is hearing-impaired and requires the use of an amplified handset in order to use the telephone, the employer may not hire the non-disabled applicant merely because hiring the hearing-impaired applicant would mean incurring the additional expense of purchasing the amplified handset.

function, there are a limited number of other employees to perform the function, or the function is highly specialized and the person is hired for special expertise or ability to perform it.³⁸ In a charge of discrimination, the regulations provide that all of the above items are evidence of the essential functions of a position.

2. *Pre-Employment Tests*.—An employer may require certain tests of a potential employee provided those tests are “job-related” and “consistent with business necessity.”³⁹ This enables an employer to determine if an applicant can perform the essential functions of the position and is therefore a QID.⁴⁰ Requiring an employee to demonstrate the ability to lift a certain weight, run a certain distance, or climb a pole is permitted, provided that the job in question requires those skills. However, tests or selection criteria related to an essential function of a position may not disqualify an individual with a disability if that person could satisfy the criteria if provided with a reasonable accommodation.⁴¹

In addition to governing what may be tested, the ADA regulates how one may be tested. Under the ADA, discrimination includes:

[F]ailing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability . . . such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the [impairment] of such employee or applicant (except where such skills are the factors that the test purports to measure).⁴²

Thus, testing procedures must accurately isolate and measure the specific skill relative to the essential job function. A test that excludes individuals with disabilities from a position because of a disability not connected to the essential skill in question is discriminatory.⁴³ Individuals with disabilities may not be excluded from positions they can actually perform simply because their disability prevents them from taking a test or causes

38. 29 C.F.R. § 1630.2(n)(2) (1992). See also MANUAL, *supra* note 16, at II-13 to II-18. Also included as evidence are the consequences of not requiring the person in the position to perform the function, the terms of a collective bargaining agreement, the work experience of both those who currently perform the job and those who have performed the job in the past, and the nature of the work operation and the employer's structure.

39. 29 C.F.R. § 1630.10 (1992).

40. *Id.* § 1630.10, app. A.

41. *Id.*

42. 42 U.S.C. § 12112(b)(7) (Supp. 1991).

43. 29 C.F.R. § 1630.10, app. A (1992).

negative results on a test that is a prerequisite to a job.⁴⁴ A facially neutral test or qualification criteria with a discriminatory impact on the disabled is discrimination under the ADA unless the employer can show a relationship between the test and the essential functions of the job.⁴⁵

3. *Medical Exams and Inquiries.*—The ADA prohibits an employer from making a pre-offer medical inquiry or requiring a medical exam to determine if the applicant has a disability or to determine the nature and severity of a disability.⁴⁶ The employer may, however, inquire of the applicant's ability to perform job-related functions.⁴⁷ The prohibition against medical inquiries includes both oral inquiries and written inquiries on application forms, as well as questions about an applicant's worker's compensation history.⁴⁸ Accordingly, questions on application forms that ask about physical or mental disabilities, unless those disabilities are related to performing an essential job function, may violate the ADA. Essentially, the ADA only allows the employer to ask an applicant if he has a physical or mental impairment which would interfere with his ability to perform a position.⁴⁹ This ensures that an employer does not screen out applicants from jobs based solely on a disability, and forces the employer to focus on job qualifications.

An employer may require a medical exam of the applicant after the applicant is offered a position.⁵⁰ Further, the employer may condition the offer of employment on the results of the exam.⁵¹ However, the ADA prevents an employer from discriminating against the applicant

44. *Id.* Example: A person with dyslexia is denied a job as a heavy equipment operator because the applicant could not pass a written test used by the employer for entry into the job training program. Assuming the applicant is able to perform the essential functions of a heavy equipment operator, the testing process may be discriminatory.

45. See H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 42 (1990).

46. 42 U.S.C. § 12112(d)(2)(A) (Supp. 1991). See generally Chai R. Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act: A View from the Inside*, 64 TEMPLE L. REV. 521 (1991). This applies to psychological as well as physiological evaluations. Report from the Committee on the Judiciary, Report 101-485, Part 3, May 15, 1990, pp. 45-46.

47. 42 U.S.C. § 12112(d)(2)(B) (Supp. 1991). Example: If driving is an essential function of a position, the employer may ask if the applicant has a driver's license, but may not ask if the applicant has a visual impairment.

48. 29 C.F.R. § 1630.13(a), app. A (1992).

49. Although an employer may question an applicant regarding the ability to perform both marginal and essential functions of a position, the employer may not refuse to hire an individual who is unable to perform the marginal functions of a position due to a disability. *Id.* § 1630.13(a), app. A (1992). Example: An employer could explain that a job requires the assembly of small parts and ask the individual if he is able to perform that function, with or without reasonable accommodation. The employer may not, however, inquire as to the nature or severity of the disability.

50. 42 U.S.C. § 12112(d)(3) (Supp. 1991).

51. *Id.* See also 29 C.F.R. § 1630.14(b), app. A (1992).

based upon the results of the exam if the applicant is capable of performing the essential functions of the job.⁵² The ADA allows post-offer medical examinations on two conditions. First, the employer may require an examination of an applicant only if all entering employees in the same job category are required to have the same examination.⁵³ Second, the employer must maintain the results of any medical exam in separate medical record files and treat the information as confidential.⁵⁴

Once an individual becomes an employee, the employer may not require medical exams except when an exam is required to determine if the employee is still able to perform the essential job functions.⁵⁵ This permits routine and regular physical examinations to determine fitness for job performance.⁵⁶ Similarly, the employer may not make inquiries of the employee regarding any disability except for inquiries into the ability of an employee to perform job-related functions.⁵⁷

4. *Reasonable Accommodation.*—Once the essential functions of a job are determined, the employer's next task is to measure the applicant against those standards to determine if the applicant can satisfy legitimate job expectations. Even if the employer determines that a person with a disability is unable to perform the essential functions, the employer is not automatically justified in denying the applicant the position. Under the ADA, a "qualified individual with a disability" is: "[A]n individual with a disability who, *with or without reasonable accommodation*, can perform the essential functions of the employment position that such individual holds or desires."⁵⁸ A person is a QID if he can perform the essential functions of a job with the assistance of a reasonable accommodation. Thus, an employer has a duty to provide assistance to an employee with a disability to help the individual perform the job. However, the employer is not obligated to lower standards or modify programs to hire an employee with a disability if no accommodation would allow the person to meet the legitimate job standards or if the only sufficient accommodation imposes an undue hardship on the employer.

52. An important point to note is that the ADA does not override any requirement under local, state, or federal law regarding medical qualifications for employment or regular medical exams.

53. 42 U.S.C. § 12112(d)(3)(A) (Supp. 1991).

54. *Id.* § 12112(d)(3)(B). An employer may divulge medical information in three situations: (1) To inform supervisors and managers of necessary restrictions on the work or duties of the employee and necessary accommodations; (2) To inform first aid and safety personnel, when appropriate, if the disability might require emergency treatment; and (3) To provide relevant information at the request of government officials investigating ADA compliance. *Id.* § 12112(d)(3)(B)(i) - (iii).

55. *Id.* § 12112(d)(4)(A).

56. 29 C.F.R. § 1630.14(c), app. A (1992).

57. 42 U.S.C. § 12112(d)(4)(B) (Supp. 1991).

58. *Id.* § 12111(8).

The ADA does not offer a complete definition of "reasonable accommodation," but suggests that the term includes:⁵⁹

- Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;⁶⁰
- Job restructuring;
- Part-time or modified work schedules;
- Reassignment to a vacant position;⁶¹
- Acquisition or modification of equipment or devices;
- Appropriate adjustment or modifications of examinations, training materials, or policies;⁶²
- The provision of qualified readers or interpreters;
- Other similar accommodations for individuals with disabilities;
- Permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment;
- Making employer-provided transportation accessible;
- Providing reserved parking spaces; and
- Permitting the use of a guide dog at work for a blind individual.

This list is not exhaustive, but illustrative of the steps employers are required to take to allow a individual with a disability to perform the functions of a position.⁶³

The employer is only required to provide a "reasonable" accommodation. An employer's obligation depends upon the needs of the specific individual and the job in question.⁶⁴ If two accommodations exist to remedy a particular situation, the employer may choose the less

59. *Id.* § 12111(9). See also MANUAL, *supra* note 16, at III-16 to III-34.

60. The public accommodation requirements of Title III of the ADA may also apply to the employer, requiring alterations to ensure accessibility to services. See *infra* note 215 and accompanying text.

61. This would be reasonable accommodation only if no reasonable accommodation to the employee's current position allows him to perform the essential functions of the job. See MANUAL, *supra* note 16, at III-25.

62. A lawsuit has been filed in the Western District of Wisconsin alleging that the State of Wisconsin violated the ADA when it failed to properly assist a dyslexic electrician take a written exam to become a master electrician. *Welbes v. Wisconsin Dept. of Indus., Labor, and Human Relations*, No. 92C566C (W.D. Wis. filed July 7, 1992). State examiners refused the plaintiff's request to bring more illustrations into the exam room, but provided him with more time for the exam and a person to read the questions.

63. 29 C.F.R. § 1630.2(o), app. A (1992).

64. Additionally, an employer is only required to provide a reasonable accommodation for a *known* disability. Disabled individuals have the burden to inform the employer of their need of an accommodation to perform the essential functions of the job. Additionally, the employer has an obligation to inform employee's of its duty to provide accommodations. MANUAL, *supra* note 16, at III-7.

expensive one. Further, an accommodation is reasonable only if the adjustment or modification is job-related and specifically assists the individual in performing the duties of a particular job.⁶⁵

Although job restructuring is an example of a reasonable accommodation, an employer is not required to alter the job description of a position to eliminate an essential function the disabled person is unable to perform.⁶⁶ Further, an accommodation is unreasonable, and not required, if it assists the individual throughout his or her daily activities, on and off the job, and is actually a personal item.⁶⁷ The duty to provide reasonable accommodations also applies to all services and programs provided in connection with employment, including non-work facilities provided for employees.⁶⁸ Thus, it may be reasonable to provide an accommodation that allows an employee with a disability to use cafeterias, lounges, gymnasiums, auditoriums, and employer-provided transportation.⁶⁹

Under the ADA, discrimination includes:

[N]ot making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.⁷⁰

The “undue hardship” standard limits the employer’s duty to provide a reasonable accommodation, and serves as a defense to a charge of discrimination for failure to make the accommodation.⁷¹ An undue hardship is an action requiring “significant difficulty or expense,” and includes any action which is unduly costly, extensive, substantial, or disruptive.⁷² Several factors are considered to determine if an otherwise reasonable accommodation creates an undue hardship:⁷³

65. 29 C.F.R. § 1630.9, app. A (1992).

66. *Id.* § 1630.2(o), app. A.

67. *Id.*

68. *Id.*

69. *Id.*

70. 42 U.S.C. § 12112(b)(5)(A) (Supp. 1991).

71. *Id.* See generally Margaret E. Stine, *Reasonable Accommodation and Undue Hardship Under the American with Disabilities Act of 1990*, 37 S.D. L. REV. 97 (1991); E. Anne Benaroya, *Reasonable Accommodation and Undue Hardship under the ADA: Selected Issues*, C669 ALI-ABA 389 (1991).

72. 42 U.S.C. § 12111(10)(A) (Supp. 1991).

73. *Id.* § 12111(10)(B).

- The nature and *net* cost of the accommodation needed;⁷⁴
- The overall financial resources of the facility involved in the provision of the reasonable accommodation;
- The number of persons employed at the facility;
- The effect on expenses and resources or the impact otherwise of such accommodation upon the operation of the facility;⁷⁵
- The overall financial resources of the covered entity;
- The overall size of the business of a covered entity with respect to the number of employees;
- The number, type, and location of facilities of the covered entity;
- The type of operation of the covered entity, including the composition, structure, and functions of the workforce of such entity; and
- The geographic separateness, and administrative or fiscal relationship of the facility or facilities in question to the covered entity.

In multilevel organizations or related entities, the entity whose financial resources are available to provide the accommodation is the proper focus.⁷⁶ Thus, whether a particular accommodation is an undue burden must always be determined on a case-by-case basis.⁷⁷

C. *Defining "Discrimination" in Employment Practices Under the ADA*

Several specific prohibitions flow from the ADA's general statement of nondiscrimination. These prohibitions extend into every facet of the employment relationship, including:⁷⁸

74. The term "net cost" is used to indicate that the actual cost of the accommodation to the employer is the relevant consideration. Net cost of the accommodation is derived after tax credits, and other government subsidies are subtracted from the total cost of the accommodation. MANUAL, *supra* note 16, at III-12 to III-13.

75. This includes a showing that the accommodation would be unduly disruptive to other employees or to the employer's ability to conduct its business. MANUAL, *supra* note 16, at III-14.

76. 29 C.F.R. § 1630.2(p), app. A (1992). Example: A fast food franchise receives no money from the franchisor and refuses to hire an individual with a hearing impairment because provision of an interpreter would be an undue hardship. Because the financial relationship between the franchisor and the franchisee is limited, only the financial resources of the franchise would be considered in determining whether the accommodation would be an undue hardship.

77. See MANUAL, *supra* note 16, at III-12.

78. 42 U.S.C. § 12112. See also MANUAL, *supra* note 16, at I-4 to I-5.

- Limiting, segregating, or classifying an applicant or employee which adversely affects employment opportunities because of the disability;
- Participating in a contract relationship with another entity that subjects, person with disability to discrimination;
- Denying employment opportunities to a person because of association with a person with a disability;
- Refusing to make reasonable accommodation;
- Using qualification standards, employment tests, or other selection criteria that screen out individuals with a disability unless job-related and necessary for business;
- Failing to use employment tests in the most effective manner to measure actual abilities; and
- Discriminating against an individual because of their opposition to an employment practice of the employer or filing a complaint, testifying, assisting, or participating in an investigation or hearing.

While general in application, the specific application of these prohibitions will await lawsuits under the ADA.⁷⁹

Another possible area for discriminatory conduct is employer provided healthcare.⁸⁰ Under the ADA, employers must provide equal access to any benefits offered. Although employers can treat employees differently for insurance purposes based upon risk, such treatment must be justified under the ADA's provisions. While the ADA does not specifically address the issue, the EEOC is developing interpretive regulations to deal with discrimination in this area.⁸¹

D. Defenses to a Discrimination Charge

An employer charged with discrimination may raise several "defenses." Although not affirmative defenses in the judicial sense, these arguments negate the employer's liability if proven. Generally, the burden is on the employer to prove these defenses in the discrimination action.

79. For instance, in *Realbuto v. Howe*, No. 92-CV-1003 (N.D.N.Y. Aug. 3, 1992), an employee has alleged that a New York state program violates the ADA because it denies equal tenure rights and job security to persons with disabilities. Employees hired under the program perform the same tasks but do not receive the same seniority as other employees.

80. The effect of the ADA on health-insurance costs is a major concern of American businesses. See 19 Pens. Rep. (BNA) 1363 (July 27, 1992).

81. See 9 Ben. Today (BNA) 324 (Oct. 16, 1992). Additionally, the EEOC is developing comprehensive guidelines concerning the ADA's impact on the whole range of employee benefit plans. 235 Daily Lab. Rep. (BNA) A-9 (Dec. 7, 1992).

1. *Business Necessity*.—First, no liability accrues if the discriminatory action is job related and consistent with business necessity.⁸² To establish this defense, the employer must prove that the use of qualification standards, tests, or selection criteria having a disparate impact on a person with a disability are: (1) Job-related, (2) consistent with business necessity, and (3) cannot be cured by a reasonable accommodation.⁸³ In other words, if the challenged action is justified by a legitimate, nondiscriminatory reason, the employer may not be liable under the ADA.⁸⁴

To establish that a qualification is “job-related,” it must be a legitimate measure or qualification for the specific job at issue.⁸⁵ Even marginal functions of a job, as compared with the essential functions, can be considered job-related. However, if a person’s disability prevents them from performing the marginal functions of a job, the employer cannot premise an employment decision on this fact.⁸⁶

The second requirement, that the criteria or qualification be consistent with business necessity, is inextricably tied to the job-related standard. Under the ADA, if the standard excludes an individual with a disability because of the disability, and does not relate to the essential functions of a job, it is not consistent with business necessity.⁸⁷ Thus, a standard may be job-related, but not consistent with business necessity if it does not relate to an essential function of the job.⁸⁸

Even if the standard is job-related and consistent with business necessity, the employer must show that the individual with the disability could not satisfy the standards, tests, or criteria even if that person was provided a reasonable accommodation.⁸⁹

2. *Undue Hardship*.—The fact that an undue hardship would result is a defense to a charge of discrimination based on an employer’s failure to provide a reasonable accommodation.⁹⁰ As discussed above, an em-

82. 42 U.S.C. § 12113(a) (Supp. 1991).

83. *Id.*

84. 29 C.F.R. § 1630.15(a) (1992). This defense is similar to the disparate treatment defense under Title VII, expressed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

85. *MANUAL*, *supra* note 16, at IV-2.

86. *Id.* at IV-2 to IV-3.

87. *Id.* at IV-3.

88. *Id.* at IV-4.

89. 42 U.S.C. § 12113(a) (Supp. 1991). Example: An employer requires an interview which is job-related and consistent with business necessity before hiring an applicant. The employer may not refuse to hire a hearing-impaired applicant because he cannot be interviewed. In this instance, an interpreter could be provided as a reasonable accommodation that would allow the individual to be interviewed and satisfy the selection criteria. Thus, this defense is only applicable if all three criteria are satisfied.

90. 29 C.F.R. 1630.15(d) (1992).

ployer is not required to provide a reasonable accommodation to an individual with a disability if doing so results in an undue hardship.⁹¹

3. *Direct Threat*.—An employer may require that an individual not pose a direct threat to the health or safety of other individuals in the workplace or to himself.⁹² If this requirement is job-related, consistent with business necessity, and cannot be cured by a reasonable accommodation, the employer has a defense against a charge of discrimination.⁹³ This requirement must be applied to each employee in the job category and not just to individuals with a disability.⁹⁴ An employee is a direct threat if he poses a significant risk to the health or safety of others that cannot be eliminated with a reasonable accommodation.⁹⁵ Thus, if an applicant is otherwise qualified for a job, he cannot be disqualified because of a physical or mental disability unless the employer shows that the disability presents a direct threat to the safety of others in the workplace. Adverse employment decisions based upon stereotypes or fear are prohibited.⁹⁶ Instead, any belief that the employee is a direct threat must be based on articulated facts derived from the individual employee's condition.⁹⁷

The employer may consider the duration of the risk and the magnitude, severity, or likelihood of the potential harm to other individuals in the workplace to determine if the individual poses a direct threat.⁹⁸ However, this must be based on the current condition of the applicant or employee, not past problems.⁹⁹ In addition, the risk must be significant before it may disqualify an individual with a disability.¹⁰⁰ The risk must pose a high probability of substantial harm. A speculative or remote risk is insufficient.¹⁰¹ If, after consideration of these factors, the employer concludes an applicant or employee poses a direct threat to other employees, the employer may make an adverse employment decision on that basis without fear of liability for discrimination.¹⁰²

91. See *supra* note 73 and accompanying text.

92. 42 U.S.C. § 12113(b) (Supp. 1991).

93. *Id.* § 12113(a).

94. 29 C.F.R. § 1630.2(r), app. A (1992).

95. 42 U.S.C. § 12111(3) (Supp. 1991).

96. *Id.*; 29 C.F.R. § 1630.2(r), app. A (1992).

97. Example: An employer may not assume that a person with a mental illness poses a direct threat to other employees. Instead, there must be objective evidence from the person's behavior that the person has a recent history of committing overt acts or making threats which caused harm or directly threatened harm.

98. 29 C.F.R. § 1630.2(r)(1) to (3) (1992).

99. *Id.* § 1630.2(r), app. A.

100. *Id.*

101. *Id.*

102. An additional defense involves federal laws and regulations that impose certain

III. PUBLIC/GOVERNMENT ENTITIES

The ADA specifically addresses the duties of public and governmental entities regarding persons with disabilities. The ADA prohibits all public entities, regardless of their size, from discriminating against individuals with disabilities.¹⁰³ A public entity is defined as: (1) Any State or local government; or (2) any department, agency, special purpose district, or other instrumentality of a State or States or local government.¹⁰⁴ Specifically, the antidiscrimination provision applicable to public entities states: "[N]o qualified individual with a disability shall, by reason of such disability be excluded from participating in or be denied the benefits of the services, programs, or activities of a public entity"¹⁰⁵

Title II of the ADA protects only "qualified individuals with disabilities" (QID), defined as:

[A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.¹⁰⁶

The "essential eligibility requirements" vary depending on the service or program in question.¹⁰⁷ If an individual with a disability satisfies these eligibility requirements, the person is a QID and is protected by the antidiscrimination rules.

A. Specific Prohibitions

1. *Provision of Services.*—A public entity may not, in providing an aid, benefit, or service with respect to a QID:¹⁰⁸

medical standards and safety requirements on various occupations. An employer may defend a charge of discrimination on the basis that the challenged act is required or necessitated under another federal law.

103. 42 U.S.C. § 12132 (Supp. 1991); 28 C.F.R. § 35.140, app. A (1992).

104. 42 U.S.C. § 12131(1) (Supp. 1991).

105. *Id.* § 12132. The term "qualified individual with a disability" qualifies who is covered by this section of the ADA. *See Id.* § 12131(2).

106. 28 C.F.R. § 35.104 (1992). The term "qualified individual with a disability" may have different definitions depending on the particular non-discrimination provision at issue. *See, e.g., infra* note 28 and accompanying text.

107. *See* official comment to 28 C.F.R. § 35.104 (1992). An example is provided by the comment of the ability of a person to receive information about a public entity's operations. The comment characterizes the essential eligibility requirements for receipt of such information as simply the request for the information. *Id.*

108. *Id.* § 35.130(b)(1) (1992). These prohibitions are based on the regulations implementing § 504 of the Rehabilitation Act of 1974 and are already applicable to some state and local entities.

- Deny the QID the opportunity to participate in or benefit from the aid, benefit, or service;¹⁰⁹
- Afford a QID an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
- Provide a QID an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
- Provide different or separate aids, benefits, or services to individuals with disabilities than is provided to others unless such action is necessary to provide a QID with aids, benefits, or services as effective as those provided to others;
- Aid or perpetuate discrimination against a QID by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability;
- Deny a QID the opportunity to participate as a member of planning or advisory boards; or
- Otherwise limit a QID in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.¹¹⁰

Although special programs for individuals with disabilities may be offered, a QID always has the right to participate in the program not designed to accommodate persons with disabilities.¹¹¹ This is true even if the non-accommodated program is less effective.¹¹² The ADA's goal is to prevent exclusion and segregation of disabled individuals based upon disabilities, ensuring integration of persons and opportunities.¹¹³

109. As an example of the ADA's application to government entities, see Jeanne Dooley & Erica Wood, *Opening the Courthouse Door: The Americans with Disabilities Act's Impact on the Courts*, 76 JUDICATURE 39 (June/July 1992).

110. In *Kent v. Director, Mo. Dep't. of Elementary & Secondary Educ. and Div. of Vocational Rehabilitation*, 792 F. Supp. 59, 61 (E.D. Mo. 1992), the court held as nonfrivolous the plaintiff's allegation that the state discriminated against him when it failed to provide an alternative to the required psychological evaluation for a job rehabilitation program. Because of his religion, the plaintiff would not submit to the psychological evaluation. Although the court held a possible ADA claim was stated, it is difficult to understand how religious beliefs constitute a "disability" under the ADA.

111. 28 C.F.R. § 35.130(b)(2) (1992). Example: There is no violation by offering special recreation programs for the disabled; however, the ADA is violated if children with disabilities are required to participate in these special programs instead of the standard programs.

112. See *Id.* § 35.130(a).

113. *Id.* § 35.130, app. A.

Even if an alternative accommodated program is offered by a public entity, the entity retains a duty to ensure the regular program is accessible to the individual with a disability. The public entity may be required to modify the standard program or provide auxiliary aids or services which allow a QID to participate in that program.¹¹⁴

All activities of a public entity are covered by the ADA, even if performed by an outside contractor.¹¹⁵ A public entity may not discriminate against an individual with disabilities through contractual or licensing arrangements.¹¹⁶ Accordingly, the ADA makes a public entity liable for the acts of any contractor or licensee.

2. *Administration.*—The nondiscrimination rules extend beyond the provision of aids, benefits, and services to encompass the actual administrative practices of a public entity. An entity may not use criteria or methods of administration that:

- Have the effect of subjecting a QID to discrimination on the basis of disability,
- Have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's programs with respect to individuals with disabilities, or
- Perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.¹¹⁷

These rules govern both the official written policies of the entity as well as its actual practices.¹¹⁸ Thus, a public entity may not promulgate or apply blatantly exclusionary policies nor policies which are neutral on their face, but have the effect of denying individuals with disabilities the opportunity to participate in programs.¹¹⁹

3. *Facility Location.*—A public entity, in selecting the site or location of a facility, may not make selections that:¹²⁰

- Have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

114. This obligation may be mitigated by the defenses available under these rules. For example, if an entity provides an alternative program which includes an interpreter for the hearing impaired, an undue burden may result if the entity is required to provide an interpreter at the standard program also. See 28 C.F.R. § 35.130, app. A (1992).

115. 28 C.F.R. § 35.102, app. A (1992).

116. *Id.* § 35.130(b).

117. *Id.* § 35.130(b)(3).

118. *Id.* § 35.130, app. A.

119. *Id.*

120. *Id.* § 35.130(b)(4).

- Have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

These rules do not apply to the construction of additional buildings at an existing site, but only to new facility locations.¹²¹

4. *Licensing/Certification Programs.*—A public entity is also prohibited from administering licensing or certification programs in a manner that subjects a QID to discrimination.¹²² Before an individual is considered a QID for these purposes, the person must satisfy the essential eligibility requirements for receiving the license or certificate.¹²³ However, the provision does not require to lowering or substantially modifying licensing requirements to accommodate a person with a disability.¹²⁴

5. *Screening Criteria.*—A public entity may not impose eligibility criteria that screen out or tend to screen out individuals with disabilities from full and equal enjoyment of any service, program, or activity.¹²⁵ Thus, a public entity may not:

- Establish exclusive or segregative criteria that bar or tend to screen individuals with disabilities from participation in services, benefits, or activities; or
- Impose requirements or burdens on disabled individuals that are not placed on others.

Such criteria may be applied, however, if necessary to the provision of the service, program, or activity being offered.¹²⁶ Accordingly, neutral requirements to ensure the safety of participants in a program are allowed if based on actual risks.¹²⁷

121. *Id.* § 35.130, app. A. However, the public entity is required to provide access to programs and services, which sometimes requires a public entity to physically modify its facility. In *Kroll v. St. Charles County, Mo.*, 766 F. Supp. 744, 753 (E.D. Mo. 1991), the district court found the county courthouse and government buildings did not comply with Title II of the ADA because they were physically inaccessible to handicapped persons. As a result, the court ordered an increase in county property taxes to facilitate renovations.

122. 28 C.F.R. § 35.130(b)(6) (1992).

123. *Id.* § 35.104.

124. *Id.* § 35.130, app. A.

125. *Id.* § 35.130(b)(8). Examples: A public entity may not require a QID to be accompanied by an attendant. A public entity may not require presentation of a drivers license as the sole means of identification for purposes of paying by check when an individual with a vision disability is ineligible for such a license and alternative means of I.D. are feasible.

126. *Id.*

127. *Id.* § 35.130, app. A. Example: All participants in a whitewater rafting program can be required to satisfy a certain swimming proficiency to participate.

6. *Limits on Liability.*—The ADA limits the duties imposed on a public entity to comply with the nondiscrimination provisions. These limits are crucial to an understanding of the remedial acts required by the ADA.

First, the ADA requires a public entity to make all reasonable modifications in policies, practices, or procedures to avoid discrimination on the basis of disability.¹²⁸ However, no modification is required if the public entity can demonstrate that making the modification would fundamentally alter the nature of the service, program, or activity.¹²⁹

Second, a public entity may not place a surcharge on particular individuals with disabilities or groups of individuals with disabilities to cover the costs of actions required by the ADA.¹³⁰ This prevents a transfer of compliance costs to those who may benefit from the services.

Third, as indicated throughout the ADA, a person may be discriminated against based on his current illegal use of drugs.¹³¹ A drug addict, as distinguished from an illegal user of drugs, is a person with a disability and protected under the ADA.¹³² Accordingly, a public entity can discriminate against someone because that person engages in the illegal use of drugs, but not because the person is a drug addict.¹³³ This provision does not apply to alcohol or the use of alcohol, and alcoholics are protected individuals under the ADA.¹³⁴

Fourth, a public entity is not required to provide personal devices or services to an individual with a disability.¹³⁵ This limitation applies to all modifications or alterations required by the ADA and limits all regulations which affect public entities.¹³⁶ This means, for example, that a public entity is not required to provide an individual wheelchair to accommodate a disabled individual in a program.

B. *Employment Practices*

A public entity is subject to the same rules, regulations, and antidiscrimination provisions as a private employer under the ADA.¹³⁷

128. *Id.* § 35.130(b)(7).

129. *Id.* Note, however, that no limitation exists merely because the modification results in undue financial or administrative burdens. Such a limit does exist when considering modifications to achieve program accessibility. See *infra* note 215 and accompanying text.

130. 28 C.F.R. § 35.130(f) (1992).

131. *Id.* § 35.131(a).

132. *Id.* § 35.131, app. A.

133. *Id.*

134. *Id.* § 35.131, app. A. See generally Wendy K. Voss, *Employing the Alcoholic Under the Americans with Disabilities Act of 1990*, 33 WM. & MARY L. REV. 895 (1992).

135. 28 C.F.R. § 35.135 (1992).

136. *Id.* § 35.135, app. A.

137. *Id.* § 35.140(b).

Accordingly, a public entity should comply with the specific guidelines regarding those requirements.¹³⁸

C. Access to Facilities, Programs, and Services

A public entity must operate each service, program, or activity so that, when viewed in as a whole, each is readily accessible to and usable by individuals with disabilities.¹³⁹ This does not necessarily require a public entity to:¹⁴⁰

- Make each existing facility accessible to and usable by individuals with disabilities;
- Take any action that would threaten or destroy the historic significance of property; or
- Take any action it can demonstrate would result in a *fundamental alteration* in the nature of the service, program, or activity or in undue financial or administrative burdens.

These limits ensure that the programs of the public entity are accessible, but do not require each facility to be accessible.¹⁴¹ If program accessibility requires structural changes to comply with the ADA, these changes must be completed by January 26, 1995.¹⁴²

1. Limitations.—Two provisions limit the duty of a public entity to make alterations to ensure access to programs. First and most importantly, a public entity is not required to take any action that would result in a fundamental alteration of the nature of the service, program, or activity or in undue financial or administrative burdens.¹⁴³ However, the public entity must take all other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the public entity.¹⁴⁴ Because the “undue burden” standard applies to program accessibility rather than facility accessibility, it will be a rare situation if a public entity is not required to ensure individuals with

138. Actually, the Title I provisions of the ADA only apply to those public employers who satisfy the requirements of Title I. *Id.* § 35.140(b)(1). All others must satisfy the requirements of the Rehabilitation Act of 1973. *Id.* § 35.140(b)(2). However, the Title I provisions were derived from the Rehabilitation Act, thus imposing essentially the same requirements on all public employers. For an analysis of Title I’s impact on state and local government, see Jean F. Galanos & Stephen H. Price, *Title I of the Americans with Disabilities Act of 1990: Concepts & Considerations for State & Local Government Employers*, 21 STETSON L. REV. 931 (1992).

139. 28 C.F.R. § 35.150(a) (1992).

140. *Id.*

141. *Id.* § 35.150, app. A.

142. *Id.* § 35.150(c).

143. 28 C.F.R. § 35.150(a)(3) (1992).

144. *Id.* § 35.150, app. A.

disabilities are able to participate in and benefit from the services, programs, or activities of the entity.¹⁴⁵

2. *Methods of Compliance with Accessibility Requirements.*—ADA regulations provide several examples of methods of complying with a public entity's program accessibility requirements.¹⁴⁶ To determine the most appropriate method of compliance, the public entity should consider the ADA's overall goal to provide services and programs in the most integrated setting possible. As a result, structural changes to facilities are not required if other methods result in program accessibility or otherwise result in compliance with the ADA.¹⁴⁷ Structural changes are required only if no other method makes the public entity's program accessible.¹⁴⁸

3. *New Construction and Alterations.*—Any facility or new part of a facility, if construction was commenced on or after January 26, 1992, must be designed and constructed to be readily accessible and usable by individuals with disabilities.¹⁴⁹ Further, any alterations made to a facility after January 26, 1992 must, to the maximum extent feasible, be accessible and usable by persons with disabilities.¹⁵⁰ To comply with this requirement, the facility should satisfy either the Uniform Federal Accessibility Standards or the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG).¹⁵¹

These structural requirements do not apply to existing buildings leased by a public entity.¹⁵² However, a public entity that leases a building

145. *Id.* To determine the burden of a particular action, all available financial resources of the public entity to fund the change should be considered. The decision that a particular action will result in a fundamental alteration or in an undue burden must be made by the head of the public entity or his designee. *Id.* § 35.150(a)(3). The official making the decision must be at least a department head with budgetary authority and responsibility for spending decisions. *Id.* § 35.150, app. A. This decision must be in writing and state the reasons for the conclusion. *Id.* § 35.150(c)(3).

146. These examples include: (1) redesign of equipment, (2) reassignment of services to accessible buildings, (3) assignments of aides to beneficiaries, (4) home visits, (5) delivery of services at alternative accessible sites, (6) alteration of existing facilities, and (7) building new facilities. *Id.* § 35.150(b)(1).

147. *Id.*

148. *Id.* 35.150, app. A.

149. *Id.* § 35.151(a). A facility under design on this date is governed by these provisions if the date that bids were invited falls after January 26, 1992. *Id.* § 35.151, app. A.

150. *Id.* § 35.151(b).

151. 28 C.F.R. § 35.151(c) (1992). The ADAAG is found at *id.* § 36, app. A (1992). A public entity choosing to comply with ADAAG is not entitled to the elevator exemption. This exemption allows a facility with less than three stories or 3000 square feet in area to not have an elevator when such would facilitate accessibility. Thus, a two-story courthouse must have an elevator, whereas a two-story private office building need not. *Id.* § 35.151, app. A.

152. *Id.* § 35.151, app. A.

must still satisfy the program accessibility requirements of the ADA.¹⁵³ In addition, if these buildings would be altered or newly constructed, the alterations or new construction must satisfy the architectural design and accessibility provisions.¹⁵⁴

D. Communications

The ADA imposes several requirements to ensure individuals with disabilities have full and effective communications with both government entities and private concerns.

1. General Requirements.—A public entity must ensure communication with members of the public with disabilities is as effective as communications with others.¹⁵⁵ To accomplish this, a public entity is required to provide auxiliary aids and services to a person with a disability that allow the disabled person to fully and equally participate in the program and benefit from its services.¹⁵⁶ The type of auxiliary aid required will depend, in large part, on the requests of the individual with the disability.¹⁵⁷ This request must be honored by the public entity unless some limitation previously discussed allows the public entity to choose an alternative.¹⁵⁸

Different situations require different forms of aid. For example, if the communication is simple and short in duration, written materials or a notepad may be sufficient. However, some circumstances may require the public entity to provide a qualified interpreter to aid in the communication. To determine if an interpreter is required, consider (1) the context in which the communication is taking place, (2) the number of people involved, (3) the importance of the communication, (4) the complexity of the communication, and (5) the duration of the communication.¹⁵⁹ Other aids or services possibly required include readers, reading devices, and close captioned television programs.¹⁶⁰

2. Communication with the Deaf.—If a public entity communicates by telephone with applicants and beneficiaries of the entity's programs, telecommunication devices for the deaf (TDDs) or equally effective tele-

153. *Id.*

154. *Id.*

155. *Id.* § 35.160(a).

156. *Id.* § 35.160(b)(1).

157. *Id.* § 35.160(b)(2).

158. For instance, the existence of other effective means of communication may be a valid reason for denial of the request. Additionally, if providing the requested aid results in a fundamental alteration of the service or an undue financial or administrative burden, the request may be denied.

159. 28 C.F.R. § 35.160, app. A (1992).

160. *Id.*

communication systems must be used to communicate to individuals with impaired hearing or speech.¹⁶¹ The ADA requires telecommunication companies to provide relay stations that allow a TDD user to communicate to a TDD operator who conveys the disabled person's communication to a standard telephone user.¹⁶² If a relay service is available, a public entity may use this service to satisfy the TDD requirements.¹⁶³ However, if relay services are unavailable, the public entity may be required to provide TDD communication services.

3. *Telephone Emergency Services.*—Telephone emergency services, including 911 services, must provide direct access to individuals who use TDD's and computer modems.¹⁶⁴ Unlike the TDD provision above, use of relay services will not provide "direct access" and does not satisfy this requirement.¹⁶⁵ Further, a public entity may not establish a separate or different emergency number for use by disabled individuals.¹⁶⁶

4. *Information and Signage.*—A public entity must guarantee all interested persons can obtain information as to the existence and location of accessible services, activities, and facilities.¹⁶⁷ This requirement applies to any person with a vision or hearing impairment.¹⁶⁸ Signage is required at each inaccessible entrance to a facility directing users to an accessible entrance or a location where they can obtain information about accessible facilities.¹⁶⁹ The international symbol of accessibility should be used at each accessible entrance to a facility.¹⁷⁰

5: *Limitations.*—As in other ADA provisions, a public entity need not take any action that fundamentally alters the nature of the service, benefit, or program, or which imposes an undue financial or administrative burden.¹⁷¹

161. *Id.* § 35.161.

162. 47 U.S.C. § 225 (1990) (Supp. 1991).

163. 28 C.F.R. § 35.161, app. A (1992).

164. *Id.* § 35.162. Relying on this regulation and the ADA, a New York district court issued a preliminary injunction ordering the City of New York to "acquire all equipment and contract for all services necessary to adapt its existing emergency 911 system such that they are directly and equally accessible" to deaf individuals using TDDs. *Chatoff v. City of New York*, No. 92 Civ. 0604 (RWS), 1992 WL 202441, at *3 (S.D.N.Y. June 30, 1992).

165. 28 C.F.R. § 35.162, app. A (1992).

166. *Id.*

167. *Id.* § 35.163(a).

168. *Id.* Example: If a building houses TDD compatible telephones or portable TDD equipment, signage must indicate the availability and location of the equipment.

169. 28 C.F.R. § 35.163(b) (1992).

170. *Id.*

171. For the particular implications of this limit, see *id.* § 35.164.

E. Special Requirements for Public Entities

First, all public entities were required to complete a self-evaluation of current services, policies, practices, and the effects thereof no later than January 26, 1993.¹⁷² Public entities employing fifty or more persons must maintain the evaluation on file and make it available for public inspection for three years.¹⁷³ This evaluation is limited to those services, policies, and practices that may not or do not meet ADA requirements.¹⁷⁴ The evaluation should be completed in writing and include a description of areas examined and any problems identified, a description of any modifications made, and a list of the interested persons consulted or invited to participate in the self-evaluation. In completing this evaluation, the public entity must provide interested persons an opportunity to participate in the self-evaluation by submitting comments.¹⁷⁵ Interested persons include individuals with disabilities or organizations representing disabled individuals.¹⁷⁶

Second, a public entity is required to provide notice to applicants, participants, beneficiaries, and other interested persons of the rights and protections provided by the ADA.¹⁷⁷ Methods of accomplishing this notice include:

- Publication of information in handbooks, manuals, and pamphlets that are distributed to the public;
- Display of informative posters in service centers and other public places; and
- Broadcast of information by television or radio.¹⁷⁸

In providing information, the public entity must satisfy the ADA's requirements regarding effective communication with disabled persons.¹⁷⁹

Third, a public entity with fifty or more employees must designate at least one employee to coordinate its efforts to comply with, and carry out, the duties imposed by the ADA.¹⁸⁰ The duties of this employee include (1) coordinating investigations of any complaint alleging non-compliance with the ADA; and (2) coordinating compliance efforts,

172. *Id.* § 35.105(a).

173. *Id.* § 35.105(c).

174. Some entities may have completed evaluations under § 504 of the Rehabilitation Act of 1973. If so, the evaluation required by the ADA is limited to those policies and practices not evaluated under the prior law. *Id.* § 35.105(d).

175. *Id.* § 35.105(b).

176. *Id.*

177. *Id.* § 35.106.

178. 28 C.F.R. § 35.106, app. A (1992).

179. *Id.* Regarding this requirement, see *infra* note 181 and accompanying text.

180. *Id.* § 35.107(a).

including self-evaluations. The name, address, and telephone number of the designated employee must be made available to all interested persons.¹⁸¹

Last, a public entity employing fifty or more employees must also adopt and publish grievance procedures which provide for prompt and equitable resolution of complaints alleging violations of the ADA.¹⁸² The purpose of this requirement is to resolve as many complaints as possible at the local level, avoiding the need to use federal complaint procedures.¹⁸³

IV. ACCESS TO FACILITIES

The ADA affects businesses and other nonpublic entities in two ways. First, as discussed above, certain restrictions are imposed on employers and their employment practices. The second area of impact is the lease, ownership, or operation of facilities which are open to the public. Only "public accommodations," (PAC) as defined by the ADA, need be concerned with these antidiscrimination provisions. However, even if an entity is not a PAC, it may qualify as a commercial facility and be subject to restrictions regarding new construction or alteration of existing facilities.

Although a facility may be required to make structural adjustments in order to comply with the ADA, the ADA is not a building code. The ADA is a civil rights law enforced through charges of discrimination brought by the government or private individuals. Building inspectors will not evaluate facilities to determine if the premises comply with the ADA unless the state or locality adopts the provisions of the ADA.¹⁸⁴ These ADA provisions limit liability for violations to the PAC, by protecting individuals from personal liability for violations.¹⁸⁵ An individual is liable, however, for retaliation or coercion in response to an individual's efforts to exercise rights under the ADA.¹⁸⁶ Thus, officers of a PAC need not be concerned about personal liability for violations of the ADA unless the retaliation or coercion prohibitions are implicated.

181. *Id.*

182. *Id.* § 35.107(b).

183. *Id.* § 35.107, app. A.

184. Under the ADA, a state or municipality may request the Justice Department to certify that its laws or building code meet or exceed the requirements of the ADA. If an action is brought against an entity for discrimination in public accommodation, compliance with a certified code is rebuttable evidence of compliance with the public accommodations provisions of the ADA. *Id.* § 36.602.

185. 28 C.F.R. § 36.102, app. B (1992).

186. *Id.* § 36.206. Example: A restaurant customer who intimidates or harasses a disabled person attempting to patronize the restaurant violates the retaliation and coercion provisions of the ADA and may be subject to personal liability under the ADA.

A. *Public Accommodation*

The public accommodation, not the *place* of the public accommodation, is subject to the nondiscrimination requirements.¹⁸⁷ A PAC is a private entity that owns, operates, or leases a place of public accommodation.¹⁸⁸ Because the ADA prohibits discrimination by any person who owns, leases (or leases to), or operates a place of PAC, the initial question is to determine what is a PAC. A three-step analysis is performed to determine if an entity is a "PAC" under the ADA.

First, to be a place of public accommodation, a facility must be operated by a private entity.¹⁸⁹ A private entity is any entity other than a public entity.¹⁹⁰ As discussed above, a public entity is any state or local government, or any department or agency thereof.¹⁹¹ Accordingly, any private business, operation, or entity that is not affiliated with, or operated by, a government will satisfy the first prong of the PAC test under the ADA. A corollary of this definition is that facilities operated by government agencies or other public entities are not PACs under the ADA.¹⁹²

Second, the operations of the entity must affect commerce.¹⁹³ Congress intended the ADA to reach all activities that affect commerce.¹⁹⁴ Accordingly, even a very local business or entity will satisfy the second prong of the PAC definition.¹⁹⁵

The third prong of the test involves the categorization of business operations. Under the ADA, a private entity is a PAC if their operations fall within one of twelve broad categories:¹⁹⁶

- Place of lodging (e.g., inn, hotel or motel);
- Establishments serving food or drink (e.g., restaurant or bar);
- Places of exhibition or entertainment (e.g., movie theater, concert hall, or stadium);
- Places of public gathering (e.g., auditorium, convention center, or lecture hall);
- Sales or rental establishments (e.g., bakery, grocery store, clothing store, hardware store, or shopping center);

187. *Id.* § 36.104, app. B.

188. *Id.*

189. 42 U.S.C. § 12181(7) (Supp. 1991).

190. *Id.* § 12181(6).

191. *Id.* § 12131(1).

192. 28 C.F.R. § 36.104, app. B (1992).

193. 42 U.S.C. § 12181(7) (Supp. 1991).

194. 28 C.F.R. § 36.104, app. B (1992).

195. This provision should be read to reach all activities which Congress, pursuant to the Commerce Clause of the Constitution, can affect.

196. 42 U.S.C. § 12181(7) (Supp. 1991).

- Service establishments (e.g., laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or attorney, pharmacy, insurance office, health care provider's office, or hospital);
- Stations used for specified public transportation;
- Places of public display or collection (e.g., museum, library, or gallery);
- Places of recreation (e.g., zoo, park, or amusement park);¹⁹⁷
- Places of education (e.g., nursery, primary, secondary, undergraduate, or graduate private school);
- Social service center or establishment (e.g., day-care center, senior citizen center, homeless shelter, food bank, or adoption agency); or
- Places of exercise or recreation (e.g., gymnasium, health spa, bowling alley, or golf course).

This list of categories is exhaustive and an entity not falling within a category is not a PAC. However, the examples within each category are not exhaustive but only illustrative of the types of covered operations. Thus, a videotape rental store is a rental establishment, and a PAC, even though not specifically listed by the Act.

B. Landlord-Tenant Relationship

The ADA imposes responsibility for compliance with the PAC's provisions on both the landlord who owns a facility housing a PAC and the tenant who owns or operates the PAC.¹⁹⁸ However, a landlord and tenant may allocate compliance responsibility between themselves by the terms of lease or other contract.¹⁹⁹ Both parties remain liable for any discrimination award under the ADA, but an agreement for indemnification or contribution rights may protect the parties should penalties or damages be assessed.

A nonpublic accommodation becomes a PAC, and susceptible to the requirements of the ADA, if it leases a facility from a PAC.²⁰⁰ Under the ADA, a "lease" only exists if an exchange of consideration

197. In *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 344 (D. Ariz. 1992), the court implicitly held that the defendant Little League Baseball and its games were "public accommodations" under this provision.

198. 28 C.F.R. § 36.201(b) (1992).

199. *Id.* See Brian N. Poll & John A. Gose, *The Americans with Disabilities Act of 1990: Impacts on Tenants, Landlords, and Lenders*, C736 A.L.I.-A.B.A. 179 (1992).

200. 28 C.F.R. § 36.104 (1992).

in some form occurs for the use of the space.²⁰¹ Accordingly, an entity does not become a PAC if it accepts donated space rather than leases space. However, if a “lease” results, the otherwise nonpublic accommodation entity is subject to the ADA.

1. Requirements.—The general ADA provision of nondiscrimination regarding public accommodations provides:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.²⁰²

From this statement flows a series of general and specific antidiscrimination guidelines. Specifically, the ADA requires existing PACs to remove architectural and communication barriers to the disabled. Further, the ADA requires subsequent alterations or new construction to conform to certain technical guidelines.

a. Contractual relationships.—First, the ADA certainly prohibits a PAC from directly engaging in activities or providing facilities that are discriminatory. In addition, the ADA prohibits a PAC from indirectly discriminating against an individual with a disability. A PAC is liable for discrimination occurring to its customers or clients because of a contractual, licensing, or other arrangement with another entity.²⁰³ A PAC is liable even if the entity with which it contracts is not covered by the ADA, but engages in discriminatory conduct. This extended liability prevents a PAC from doing indirectly, through a contract or otherwise, what it is prohibited from doing directly.²⁰⁴

b. Policy modification.—Second, in addition to physical alterations, the ADA requires a PAC to make reasonable modifications in policies, practices, or procedures necessary to ensure access to goods, services, or facilities by individuals with disabilities.²⁰⁵ This requirement is similar to the reasonable accommodations requirement of the employment provisions of the ADA.²⁰⁶ However, a PAC need not make modifications

201. *Id.* § 36.201, app. B.

202. 42 U.S.C. § 12182(a) (Supp. 1991).

203. *Id.* § 12182(b)(1)(A)(i)-(iv).

204. 28 C.F.R. § 36.202, app. B (1992).

205. 42 U.S.C. § 12182(b)(2)(A)(ii) (Supp. 1991); 28 C.F.R. § 36.302(a) (1992). Example: A parking facility must alter a policy prohibiting all vans or all vans with raised roofs from parking if an individual wishing to use a wheelchair accessible van wants to park in the facility, provided the height of the facility would accommodate the van.

206. See *supra* text accompanying note 58.

that would fundamentally alter the nature of the goods, services, facilities, privileges, or accommodations of the entity.²⁰⁷

c. Insurance.—A public accommodation may not refuse to serve an individual with a disability because its insurance company conditions its rates on the absence of individuals with disabilities.²⁰⁸ Beyond this, the ADA does not place any restrictions on the terms, conditions, and offering of insurance policies by PACs.²⁰⁹ The ADA only prevents differential treatment of individuals with disabilities in insurance offered by PACs that are based upon disability rather than sound actuarial data and established risk practices.²¹⁰ Thus, if differential treatment of individuals with disabilities is justified by sound insurance practices, a PAC may continue a standard insurance program.

d. Eligibility criteria.—A public accommodation may not impose or apply eligibility criteria that screen out, or tend to screen out, an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, and accommodations, unless such criteria are necessary.²¹¹ This rule prohibits:²¹²

- Attempts to unnecessarily identify the existence of a disability,
- Imposing requirements or burdens on individuals with disabilities that are not placed on other individuals,
- Placing a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the cost of measures required under the ADA, and
- Establishing segregative eligibility criteria that bar or limit a class of individuals with disabilities from full enjoyment of the public accommodation.

However, a PAC may apply neutral rules that screen out individuals with disabilities if those rules are necessary for the safe operation of

207. 42 U.S.C. § 12182(b)(2)(A)(ii) (Supp. 1991). Example: A museum would not be required to modify a rule prohibiting the touching of art to enhance the participation of a blind individual if the touching threatened the integrity of the art. One specific provision of the regulations requires a PAC to permit the use of a guidedog or other service animal to assist a disabled individual. This is intended to be applied broadly and applies to restaurants, hotels, retail stores, and the myriad of other PACs.

208. 28 C.F.R. § 36.212(c) (1992).

209. *Id.* § 36.212(a).

210. *Id.* § 36.212, app. B. Example: The person who is blind may not be denied coverage based on blindness independent of actuarial risk classification. A public accommodation may offer insurance policies that limit coverage for certain procedures or treatments, but may not entirely deny coverage to a person with a disability.

211. 42 U.S.C. § 12182(b)(2)(A)(i) (Supp. 1991).

212. 28 C.F.R. § 36.301, app. B (1992).

the PAC.²¹³ If used, these safety requirements must be based on actual risk, not mere speculation, stereotypes, or generalizations about individuals with disabilities.²¹⁴

C. Access to Public Accommodations

The obligations imposed by the ADA to ensure access to PACs depend upon whether the accommodation is in an existing facility or is in a newly constructed or altered facility. Because the retrofitting of existing facilities imposes substantial costs on a business or accommodation, the duty to modify a facility is less rigorous than the duty imposed at the design phase.²¹⁵

1. Existing Public Accommodation.—A public accommodation must remove architectural barriers and communication barriers in existing facilities that are structural in nature if removal is “readily achievable.”²¹⁶ Physical objects that impede access to, or use of, a facility by an individual with a disability must be removed,²¹⁷ including those barriers to communications that are an integral part of the physical structure.²¹⁸

Removal of architectural barriers is only required if “readily achievable.” This is defined as easily accomplishable and able to be carried out without much difficulty or expense.²¹⁹ To determine whether removal is readily achievable, a PAC should consider the following:²²⁰

- The nature and cost of the action needed;
- The overall financial resources of the site or sites involved, the number of persons employed at the site, the effect on expenses and resources, or the impact upon the operation of the site;
- The geographic separateness and administrative or fiscal relationship of the site or sites to any parent corporation or entity;

213. *Id.* § 36.301(b).

214. *Id.* In *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342 (D. Ariz. 1992), the court granted a temporary restraining order preventing the defendant from enforcing a general rule prohibiting persons in wheelchairs from serving as on-field coaches during baseball games. Relying on 28 C.F.R. § 36.208(c), the court held that the ADA requires an individualized and specific determination that the particular person poses a direct threat before segregative policies may be applied. *Anderson*, 794 F. Supp. at 345.

215. 28 C.F.R. § 36.304, app. B (1992). When accessibility can be more conveniently and economically incorporated in the initial stages of design, the obligations imposed by the ADA are more stringent.

216. *Id.* § 36.304(a).

217. *Id.* § 36.304, app. B.

218. *Id.*

219. *Id.* § 36.304(a).

220. *Id.* § 36.104.

- If applicable, the overall financial resources and size of any parent corporation or entity; and
- If applicable, the type of operation of any parent corporation or entity.

Many situations require the PAC to evaluate the resources of a parent company or organization to determine if an action is readily achievable.²²¹ The resources of the parent company are only relevant to the degree the financial resources of the parent are available to the subsidiary.²²²

The “readily achievable” standard limits a PAC’s duty to remove barriers.²²³ Essentially, the ADA requires the burden of barrier removal to be balanced with the duty to ensure access to PACs. Examples of barrier removal that may be considered readily achievable include the following:²²⁴

- Installing ramps;
- Making curb cuts in sidewalks and entrances;
- Repositioning shelves;
- Adding raised markings on elevator control buttons;
- Installing flashing alarm lights;
- Widening doors;
- Installing offset hinges to widen doorways;
- Eliminating a turnstile or providing an alternative accessible path;
- Installing accessible door hardware;
- Installing grab bars in toilet stalls;
- Rearranging toilet partitions to increase maneuvering space;
- Insulating lavatory pipes under sinks to prevent burns;
- Installing a raised toilet seat;
- Installing a full-length bathroom mirror;
- Repositioning the paper towel dispenser in a bathroom;
- Creating designated accessible parking spaces;
- Installing an accessible paper cup dispenser at an existing inaccessible water fountain;
- Removing high-pile, low-density carpeting; and
- Installing vehicle hand controls.

This list is illustrative and not exhaustive of the barrier removals that may be readily achievable. Actual determination of whether removal is readily achievable depends upon the specific facts and circumstances

221. 28 C.F.R. § 36.104, app. B (1992).

222. *Id.*

223. *Id.* § 36.104, app. B.

224. *Id.* § 36.304(b).

confronting the entity. Further, the PAC has a continuing obligation to remove barriers, i.e., removal that is not currently readily achievable may become so in the future.

The obligations to remove barriers does not extend to areas of a facility used exclusively as employee work areas.²²⁵ This result is dictated by the purpose of the ADA, which is to ensure that PACs are accessible to their customers, clients, or patrons, as opposed to the employees.

a. Recommended priorities and planning document.—Regulations offer a recommended order in which barriers should be removed.²²⁶ Adherence to the priority list discussed below is evidence of the covered entity's "good faith effort" in complying with the ADA, and must be considered by courts when assessing penalties for ADA violations.²²⁷

First, access to the PAC from public sidewalks, parking, or public transportation should be provided.²²⁸ This includes installing entrance ramps, widening entrances, and providing accessible parking spaces. Overall, the highest priority is ensuring that an individual with a disability has physical access to a public accommodation.²²⁹

Second, a PAC should ensure access to areas where goods and services are made available to the public.²³⁰ Among the measures available are adjusting the layout of display racks, rearranging tables, providing Braille and raised character signage, widening doors, providing visual alarms, and installing ramps.²³¹

Third, a PAC should provide access to public restrooms, which may require widening of toilet stalls, installation of grab bars and removal of obstructing furniture.²³² Finally, a PAC should take any other measures required to ensure access to its operations, goods, or services.²³³

In addition to these priorities, the Department of Justice recommends that every PAC adopt an ADA compliance plan.²³⁴ The adoption of a plan is also evidence of a good faith effort to comply with the ADA and may mitigate penalties for violations. In adopting a plan, a PAC should evaluate its facilities to determine the alterations required to comply with the ADA. To facilitate this evaluation, PACs should consult with local community disability groups regarding barrier removal and

225. 28 C.F.R. § 36.304, app. B (1992).

226. *Id.* § 36.304(c) (1992).

227. *See* 42 U.S.C. § 12188(b)(5) (Supp. 1991).

228. 28 C.F.R. § 36.304(c)(1) (1992).

229. *Id.*

230. *Id.* § 36.304(c)(2).

231. *Id.*

232. *Id.* § 36.304(c)(3).

233. *Id.* § 36.304(c)(4).

234. *See* 28 C.F.R. § 36.304, app. B (1992).

appropriate remedial measures.²³⁵ A written plan of compliance, including identified barriers, measures to remove the barriers, and costs associated with removal, should be maintained by the PAC.

b. Miscellaneous provisions.—First, if removal of a barrier is not readily achievable, a PAC must take all available alternative measures which are readily achievable to ensure access to its facilities, goods, and services.²³⁶ Examples of alternatives include providing curb service or home delivery, retrieving merchandise from inaccessible shelves or racks, and relocating activities to accessible locations.²³⁷

Second, the ADA does not require PACs to allow smokers to smoke in the accommodation.²³⁸ Thus, the ADA does not prevent a PAC from prohibiting or restricting smoking.²³⁹

Third, a PAC must ensure that features and facilities required by the ADA are maintained in operable condition.²⁴⁰ Temporary obstructions or isolated incidents of non-operation of a facility are allowed, especially if the failure is due to maintenance or repair.²⁴¹ Thus, reasonable interruptions in access are allowed, but inaccessibility for an unreasonable amount of time or repeated failures may violate the ADA.²⁴²

Lastly, a PAC is not required to provide customers, clients, or participants with personal devices or services to ensure access to the accommodation's facilities.²⁴³ Devices such as wheelchairs, eye glasses, and hearing aids, or services of a personal nature, including assistance in eating, toileting, or dressing are not required.²⁴⁴ This rule serves as a limit for every requirement of the ADA regarding PACs.²⁴⁵

2. Alterations/New Construction.—

a. Alterations to existing facilities.—As previously indicated, a PAC may be required to remove barriers to access if removal is readily achievable. Any alteration beginning after January 26, 1992, must ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to, and usable by, individuals with disabilities.²⁴⁶ An alteration is any change to a place of PAC that affects, or could

235. *Id.*

236. *Id.* § 36.305(a). For definition of readily achievable, see *supra* note 219 and accompanying text.

237. 28 C.F.R. § 36.305(b) (1992).

238. *Id.* § 36.210, app. B.

239. 42 U.S.C. § 12201(b) (Supp. 1991).

240. 28 C.F.R. § 36.211(a) (1992).

241. *Id.* § 36.211(b).

242. *Id.* § 36.211, app. B.

243. *Id.* § 36.306.

244. *Id.*

245. *Id.* § 36.306, app. B.

246. 28 C.F.R. § 36.402(a)(1) (1992).

affect, the usability of the building or facility.²⁴⁷ This includes remodeling, renovation, reconstruction, or changes in structural parts of a facility.²⁴⁸ Compliance with this rule is accomplished if the altered structure or element complies with the ADAAG.²⁴⁹ However, a PAC may deviate from the ADAAG requirements if compliance is not readily achievable at the time of the barrier removal.²⁵⁰ In these situations, the accommodation is required to undertake the alteration or removal that is readily achievable even if not within strict compliance with the ADAAG.²⁵¹

An alteration that affects, or could affect, the usability or accessibility of an area of a facility containing a primary function must be made to ensure that, to the maximum extent feasible, the path of travel to the altered area, and the rest rooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities.²⁵² This “path of travel” requirement does not apply if the cost and scope of the alteration is disproportionate to the cost of the overall alteration.²⁵³

Thus, this rule requires that a continuous, unobstructed way of pedestrian passage that connects the altered area with an exterior approach, such as an entrance to the facility, must be made readily accessible and usable by individuals with disabilities.²⁵⁴ Under the ADA, a primary function is a major activity for which the facility is intended.²⁵⁵ Examples of areas that contain primary functions include a customer service area of a bank, the dining room of a cafeteria, and the meeting room of a conference center. Mechanical rooms, boiler rooms, supply storage rooms, employee lounges, and rest rooms are not areas containing primary functions.²⁵⁶

As noted above, an accessible path of travel need not be provided if the cost of the alteration to provide the path is disproportionate to the overall cost of the alteration to the primary area. An alteration is disproportionate if the cost exceeds 20% of the cost of the alteration to the primary function area.²⁵⁷ In determining the cost of the provision of an accessible path, the accommodation can consider expenses relating

247. *Id.* § 36.402(b).

248. Normal maintenance, reroofing, painting, wallpapering, or changes to mechanical or electrical systems are not generally considered alterations. *Id.* § 36.402(b)(1).

249. *Id.* § 36.402(b)(2). These guidelines are found at *id.* § 36, app. A (1992).

250. *Id.* § 36.304(d)(2).

251. *Id.* § 36.304, app. B.

252. *Id.* § 36.403(a).

253. *Id.*

254. *See id.* § 36.403(e)(1).

255. *Id.* § 36.403(b).

256. *Id.*

257. 28 C.F.R. § 36.403(f)(1) (1992).

to widening doorways, installing ramps, making rest rooms accessible, and other costs associated with providing an accessible entrance and route to the altered area.²⁵⁸ If the PAC determines that the cost of providing an accessible path of travel is disproportionate to the alteration to the primary area, alterations must be made up to the point that disproportionate costs are incurred.²⁵⁹ If determined that full accessibility is unfeasible, the accommodation's priorities are first to provide an accessible entrance to the altered primary area, then an accessible route to the altered area, and then an accessible route to ancillary facilities such as restrooms and telephones.²⁶⁰

A major source of concern, especially for owners of older buildings, is the possibility that the ADA will require the installation of elevators to ensure accessibility to a building. However, the ADA does not require the installation of an elevator in an altered facility that is less than three stories or has less than 3,000 square feet per story.²⁶¹ However, any facility that houses a shopping center, a shopping mall, or the professional office of a health care provider does not enjoy this exemption.²⁶² Additionally, even if an altered facility is not eligible for this exemption, the facility is not required to install an elevator if installation would be disproportionate in cost and scope to the cost of the overall alteration.²⁶³

b. New construction.—Effective January 26, 1993, a PAC failing to design and construct facilities for first occupancy not readily accessible to, and usable by, individuals with disabilities violates the ADA.²⁶⁴ To comply with the requirements of this section, a newly-constructed facility should satisfy the ADAAG.²⁶⁵ The compliance requirements for new construction are included in the ADAAG rules which provide more adequate technical assistance.

These new construction rules need not be complied with if the entity can demonstrate it is structurally impracticable to satisfy the require-

258. *Id.* § 36.403(f)(2).

259. *Id.* § 36.403(g).

260. *Id.* § 36.403(g)(2).

261. *Id.* § 36.404(a).

262. *Id.* A shopping center or shopping mall is any building that houses five or more sales or rental establishments.

263. *See id.* § 36.403(f)(1).

264. 42 U.S.C. § 12183(a) (Supp. 1991); 28 C.F.R. § 36.403(f)(1) (1992). Thus, a facility is subject to these rules only if a completed application for a building permit or permit extension was filed after January 26, 1992, and the facility is occupied after January 26, 1993. *Id.* § 36.401, app. B.

265. 28 C.F.R. § 36.401, app. B (1992). These guidelines are contained at 28 C.F.R. § 36, app. A (1992).

ments.²⁶⁶ Even if full compliance is structurally impracticable, the entity must comply with the ADAAG to the extent compliance is not structurally impracticable.²⁶⁷ The regulations allow deviation from accessibility requirements only if unique characteristics of terrain would prevent the incorporation of an accessibility feature.²⁶⁸

As with structural changes, the elevator exemption for new construction does not require the installation of an elevator in a facility less than three stories or with less than 3000 square feet per story, unless the facility houses a shopping center, shopping mall, or the professional office of a healthcare provider.²⁶⁹ This exemption is practically identical to the elevator exemption provided for altered facilities.

D. Commercial Facility

The new construction requirements of the ADA apply not only to PACs, but also to commercial facilities.²⁷⁰ A commercial facility is a facility whose operation affects commerce and is intended for nonresidential use by a private entity.²⁷¹ The term commercial facility is not intended to be defined by a dictionary or common industry definitions and includes factories, warehouses, office buildings, and other buildings in which employment may occur.²⁷² Thus, a facility that does not house a PAC must still satisfy the requirements of the new construction provisions of the ADA. Under this broad definition, most commercial buildings will be required to satisfy the ADAAG or be liable for ADA violations for discriminatory conduct.

E. Tax Deduction and Credits

Certain tax deductions are allowed under the Internal Revenue Code for expenses associated with ADA compliance.²⁷³ Up to \$15,000 per year can be deducted for expenses incurred in removing qualified architectural barriers.²⁷⁴ In addition, eligible small businesses may claim a tax credit of 50% of the costs of complying with the ADA for all costs between \$250 and \$10,250.²⁷⁵ A small business is eligible for this tax credit if

266. 42 U.S.C. § 12183(a)(1) (Supp. 1991).

267. 28 C.F.R. § 36.401(c)(2) (1992).

268. *Id.* § 36.401, app. B.

269. 42 U.S.C. § 12183(b) (Supp. 1991).

270. *Id.* § 12183(a).

271. *Id.* § 12181(2).

272. 28 C.F.R. § 36.104, app. B (1992).

273. See I.R.S. PUBLICATION NO. 907, TAX INFORMATION FOR HANDICAPPED AND DISABLED INDIVIDUALS.

274. 26 U.S.C. § 190 (1990).

275. *Id.* § 44.

the business's gross receipts are less than \$1 million or its workforce is thirty or less full-time employees.²⁷⁶ Some examples of eligible expenses include costs of barrier removal, providing readers and interpreters, and the costs of acquiring or modifying equipment for persons with disabilities.²⁷⁷ Both the deductions and credits must be necessary and reasonable costs and, therefore, "eligible expenditures."²⁷⁸

In addition, an employer is eligible to receive a tax credit up to forty percent of the first \$6,000 of first-year wages of a new employee with a disability. This applies only to an employee referred by state or local vocational rehabilitation agencies, a state commission on the blind, or the U.S. Department of Veterans Affairs, and certified by a state employment service.²⁷⁹ This credit is applicable only for the first year of employment and only once the employee has been employed for at least ninety days or has completed 120 hours of work for the employer.²⁸⁰

V. ENFORCEMENT OF THE ADA AND AVAILABLE REMEDIES

An entity violating the antidiscrimination provisions of the ADA is subject to legal action initiated either by the government or the aggrieved individual. The method for the enforcement of rights guaranteed by the ADA and the remedies available for violations varies somewhat depending on what portions of the ADA have been violated. Both governmental and private organizations are adopting measures to prevent large increases in litigation as a result of the ADA.²⁸¹ Generally, however, the enforcement and remedies for ADA violations are the same as those under Title VII of the Civil Rights Act of 1964.²⁸²

A. *Employment Practices*

Violations of the employment provisions of the ADA expose a violator to the same liability as violations of Title VII of the Civil Rights

276. *Id.* § 44(b).

277. *Id.* § 44(c)(2).

278. *Id.* § 44(c)(3); § 190.

279. *Id.* § 51.

280. *Id.*

281. For example, Illinois has developed a computer information-sharing system to assist businesses in complying with the ADA. The goal of the program, touted as a national model of ADA information systems, is to reduce the number of discrimination suits filed under the ADA. 19 Pens. Rep. (BNA) 296 (Feb. 17, 1992).

282. See 42 U.S.C. §§ 107, 308 (1988). The reason for this similarity is Congress' intent to provide disabled individuals remedies parallel to those available to women or minorities suffering from discrimination. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 48-49 (1990).

Act of 1964.²⁸³ Thus, under the ADA, the goal of an award of a remedy is to return the aggrieved individual to the same status they would have enjoyed had the discrimination not occurred.

The ADA incorporates the procedures under Title VII redressing employment violations as an enforcement mechanism.²⁸⁴ This allows a private right of action and authorizes government agencies to investigate violations and file suits on behalf of individuals suffering discrimination.²⁸⁵ Before bringing a private lawsuit, an aggrieved individual is required to file a complaint with the EEOC.²⁸⁶

B. Public and Governmental Entities/Services

The remedies and enforcement procedures for violation of the public entity provisions are those provided in the Rehabilitation Act of 1973. Accordingly, an individual suffering discrimination has a private right of action and is not required to exhaust any administrative remedies before bringing suit.²⁸⁷ Additionally, the government, including the Department of Justice, can investigate and prosecute violations of the ADA. The Justice Department has indicated that it will attempt to avoid litigation and instead seek to settle voluntarily any complaints through negotiation.²⁸⁸

283. The ADA incorporates the powers, remedies, and procedures provided for violations of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a) (Supp. 1991).

284. The broad and complex remedial procedures under Title VII are beyond the scope of this Article. However, many treatises examine Title VII procedures. Between the date the ADA become effective, July 26, 1992, and October 30, 1992, the EEOC received 1,477 charges of discrimination. Over half of these complaints alleged discriminatory discharge. *See* 220 Daily Lab. Rep. A-10 (Nov. 13, 1992). The EEOC estimates there will be over 12,000 charges filed during fiscal year 1993. *See* 19 Pen. Rep. (BNA) 1908 (Oct. 26, 1992). Interestingly, the federal fiscal budget for 1993 contains no new funding for the EEOC, despite its new duties of enforcing the ADA. 232 Daily Lab. Rep. A-7 (Dec. 2, 1992).

285. The EEOC recently filed the first lawsuit alleging a violation of the ADA's employment provisions. This suit, filed on November 6, 1992, seeks an injunction as well as back pay for the employee. *See* Lab. L. Rep. (CCH), Rep. 458 (Nov. 16, 1992).

286. The EEOC will attempt to conciliate a solution to the discrimination or either bring suit on behalf of the victim or issue a "right to sue" letter allowing the victim to bring an individual law suit. This process is applicable to victims of discrimination under the ADA as held in *Kent v. Director, Mo. Dept. of Elementary and Secondary Ed. and Div. of Vocational Rehab.*, 792 F. Supp. 59, 62 (E.D. Mo. 1992).

287. 29 U.S.C. § 794(a) (1988). *See also* SEN. COMM. ON LABOR & HUMAN RESOURCES, REPORT FROM THE COMMITTEE ON LABOR AND HUMAN RESOURCES, No. 101-116, Aug. 30, 1989, p. 57-58.

288. This is the Justice Department's position regarding enforcement obligations under Title II (government entities) and Title III (public accommodations). *See* 155 Daily Lab. Rep. (BNA) A-19 (Aug. 11, 1992).

C. *Public Accommodations*

An individual who suffers discrimination prohibited by the PAC provisions of the ADA is entitled to injunctive relief.²⁸⁹ Once it has been established that an entity covered by the ADA is violating one or more of the Act's provisions, a court may order the entity to:²⁹⁰

- Alter facilities to make such readily accessible to, and usable by, individuals with disabilities to the extent required under the ADA;
- Provide auxiliary aids or services;
- Modify a policy; or
- Provide alternative methods of access.

The ADA authorizes the Department of Justice to investigate and enforce the provisions of the PACs section of the ADA in two situations.²⁹¹ First, the Attorney General may file suit for an ADA violation if there is reason to believe an entity is engaged in "a pattern or practice" of behavior violating the ADA.²⁹² Second, the Attorney General may file suit if anyone is discriminated against in violation of the ADA where the violation raises issues of general public importance.²⁹³ Thus, the ability of the Justice Department to investigate ADA violations is severely circumscribed.

If a violation is found as a result of the Attorney General's lawsuit, the court may order the same injunctive relief available to an individual. In addition, the court is authorized to assess monetary damages to be paid to those persons suffering the discrimination.²⁹⁴ Most importantly, the ADA allows a court to assess a penalty against the violating entity of as much as \$50,000 for the first violation and no more than \$100,000 for any subsequent violation.²⁹⁵ In assessing the penalty, a court must consider any good faith effort of the entity to comply with the ADA, including whether the entity could have anticipated the need to provide an auxiliary aid to assist a disabled person.²⁹⁶

D. *Attorney's Fees Awards*

Under the ADA, a party who brings an action to enforce the ADA and who prevails may recover a reasonable attorney's fee, including litigation expenses and costs.²⁹⁷

289. 42 U.S.C. § 12188(a)(1) (Supp. 1991).

290. *Id.* § 12188(a)(2).

291. *Id.* § 12188(b).

292. *Id.* § 12188(b)(1)(B)(i).

293. *Id.* § 12188(b)(1)(B)(ii).

294. *Id.* § 12188(b)(2)(B). The Act, however, prohibits the assessment of punitive damages against a violating entity. *Id.* § 12188(b)(4).

295. *Id.* § 12188(b)(2)(C).

296. *Id.* § 12188(b)(5).

297. *Id.* § 12205.

VI. CONCLUSION

The ADA is new, complicated, and difficult to interpret and apply. However, it is a revolutionary civil rights statute, protecting to the fullest extent those individuals suffering from disabilities. Undoubtedly, the periphery of the ADA's provisions will become more concrete and delineated as courts struggle to interpret and apply the statute in the future. To a large extent, commentators, including the author of this Article, are merely making well-supported conjecture about what the Act means. Its exact "meaning," if such exists, currently lies only in the recesses of the minds of judges and administrative agencies. The challenge of the attorney is to shape and influence the development of this meaning as it emerges consistent with the intent of Congress and the public good.

Bankruptcy in the Seventh Circuit: 1992

DOUGLASS G. BSHKOFF*

The Seventh Circuit continues to hear and decide a substantial number of bankruptcy appeals. In 1992, as contrasted with the preceding two years, there were fewer noteworthy opinions. However, among this smaller number of decisions were several of great importance. This Article surveys all decisions released on or before December 27, 1992, and addresses the following topics: (1) Exemptions, (2) Estate Property, (3) Avoiding Powers, (4) Chapter 13, (5) Conversion, and (6) Procedure.

I. EXEMPTIONS

Indiana is one of twenty-five American jurisdictions¹ that recognize the existence of a special form of joint property ownership, the tenancy by the entirety, available only to married couples. Property held in this form of joint ownership is, in Indiana and some other jurisdictions,² immune to collection activity pursued by creditors of either individual spouse. The entirety estate is, however, always subject to being taken in satisfaction of the claims of joint creditors.

While the Bankruptcy Act of 1898 was in force, an individual spouse's interest in the entirety asset did not become part of the bankruptcy estate. Since its value could not be distributed to creditors, the protection of this asset from creditors of only one spouse continued during bankruptcy. Joint creditors were in a better position. Those with a lien on the entirety estate could enforce the lien after bankruptcy. Unsecured joint creditors were protected either by allowing them to reduce their claims to judgment prior to discharge³ or by creating a separate marital unit liability that could not be discharged during the course of a single spouse bankruptcy.⁴

Passage of the 1988 Bankruptcy Code appeared to change the legal status of entirety assets in two ways: It provided that the individual spouse's interest was property of the estate under 11 U.S.C. § 541(a)(2),

* Robert H. McKinney Professor of Law, Indiana University—Bloomington. I am grateful for the research assistance of Stacia Yoon, J.D., 1992, Indiana University School of Law—Bloomington.

1. 7 COLLIER ON BANKRUPTCY (MC) ¶ 801 - 814.1 (15th ed. 1992).

2. Some jurisdictions that recognize tenancy by the entirety allow individual creditors to reach the entirety estate.

3. This practice originated in the Fourth Circuit. See *Phillips v. Krakower*, 46 F.2d 764, 766 (4th Cir. 1931).

4. *Smith v. Beneficial Fin. Co.*, 218 N.E.2d 921 (Ind. Ct. App. 1966).

and it allowed exemption of the entirety interest pursuant to 11 U.S.C. § 522(b)(2)(B). Notwithstanding this new statutory language, courts continued to protect the interest of joint creditors either by holding that the entirety interest did not become part of the bankruptcy estate⁵ or by disallowing the exemption claim when a joint creditor existed.⁶ Now, in two decisions, the Seventh Circuit has ruled that past practices cannot continue in Indiana bankruptcies. Entirety interests are completely exempt when only one spouse files for bankruptcy.

In *In re Hunter*,⁷ a joint creditor sought to obtain a judicial lien on the entirety estate so that the *in rem* right thus created would protect it following bankruptcy. There was authority for this action in other circuits.⁸ However, Judge Ripple emphatically rejected a similar approach for Indiana debtors. He relied heavily on the provisions of Indiana Code section 34-2-28-1(a)(5), which transforms Indiana's common law entirety immunity into an express statutory exemption.

In a state such as Indiana, whose common law grants entirety property immunity from creditors of one spouse alone, the effect of section 522(b)(2)(B) — standing alone and without any reference to state statutory exemptions — is partially to exempt entirety property: the property is subject to sale and distribution to joint creditors, but exempted from claims of individual creditors.

. . . By allowing the debtor to completely exempt his interest in entirety property from the bankruptcy estate, Indiana has not preserved the amenability of that property to creditors but shielded it from all creditors, including joint creditors.⁹

5. *In re Jeffers*, 3 B.R. 49, 56 (Bankr. N.D. Ind. 1980). Since the entirety interest did not enter the bankruptcy estate, it could not be exempted pursuant to § 522(b)(2)(B). *Jeffers* also permitted the trustee to administer this asset for the benefit of joint creditors. *Id.* at 57.

6. *Napotnik v. Equibank and Parkvale Sav. Ass'n*, 679 F.2d 316 (3d Cir. 1982). *Napotnik* involved a debtor's unsuccessful attempt to avoid a joint creditor's judgment lien on an entirety estate pursuant to 11 U.S.C. § 522(f). The court held that the judgment lien could not be avoided since the property was not exempt. *Id.* at 320. The property was not exempt since state law permitted the creditor to obtain a judgment lien. Despite this circular reasoning, *Napotnik* is often cited and has influenced the treatment of entirety estates in three other circuits. See *In re Garner*, 952 F.2d 232 (8th Cir. 1991); *Sumy v. Schlossberg*, 777 F.2d 921 (4th Cir. 1985); *In re Grosslight*, 757 F.2d 773 (6th Cir. 1985). However, *Owen v. Owen*, 111 S. Ct. 1833 (1991), overrules these four cases by implication. See Douglass G. Boshkoff, *Entireties Estates in Individual Bankruptcies After Owen v. Owen*, Norton Bankr. Law Adviser 12 (Jan. 1993).

7. 970 F.2d 299 (7th Cir. 1992).

8. See cases cited *supra* note 6.

9. 970 F.2d at 307-08.

Hunter's sharp break with past practice was confirmed shortly thereafter when a second panel reached exactly the same conclusion in *In re Paeplow*.¹⁰

We also reject the creditors' suggestion that the Indiana legislature intended § 34-2-28-1(a)(5) to merely codify the Indiana common law practice of immunizing entirety property from execution by individual creditors (but not joint creditors). . . . Most significantly, this interpretation violates the plain meaning of the Indiana statute, which reflects an intent to create a blanket exemption for entirety property in the bankruptcy context. Thus, we conclude that the Indiana legislature intended § 34-2-28-1(a)(5) to shield the entirety property of a debtor in bankruptcy from the claims of creditors — including joint creditors — to the greatest degree possible.

. . . .

We acknowledge that this interpretation may create the same potential for legal fraud available to unscrupulous debtors under the Act. (citation omitted) However, that result stems from Indiana's decision to grant its residents such sweeping protection of entirety property from the claims of creditors in bankruptcy. Given the strong fresh start policy embodied in the Code, we are hesitant to subvert that policy by crafting judicial exceptions to discharge. (citations omitted).¹¹

Following *Hunter* and *Paeplow*, the strategy for both debtors and creditors is well-defined. Since the Indiana exemption is not available in joint or consolidated cases, married couples seeking to protect property held as tenants by the entirety should never file jointly.¹² One spouse's individual case should be closed before the second spouse's case is commenced so that consolidation of the two individual cases is not possible. Creditors, on the other hand, should attempt to force consolidation. An involuntary case should be filed for the second spouse, if possible, and should be followed by a motion for consolidation.¹³

10. 972 F.2d 730 (7th Cir. 1992).

11. *Id.* at 737.

12. The special immunity for entireties interests exists because joint creditors have different rights than creditors of an individual spouse. This difference disappears when consolidation occurs. Even if the Indiana statute did not refer to joint or consolidated cases, it is quite likely that the immunity would cease to exist in a consolidated case. *Cf.* HENRY J. SOMMER, CONSUMER BANKRUPTCY LAW AND PRACTICE § 6.4 (3d ed. 1988) (advising against the filing of a joint case when entirety property exists).

13. *Hunter* refused to consider whether the Indiana statute was preempted by federal law because it purported to control the bankruptcy consequences of a joint filing

II. PROPERTY OF THE ESTATE

The status of pension plans in bankruptcy has been sharply debated in recent years. Now that the United States Supreme Court has ruled that Employee Retirement Income Security Act (ERISA)-qualified plans are not property of the estate,¹⁴ attention will shift to the trustee's rights with regard to those remaining plans which do enter the estate. *In re Lyons*¹⁵ reminds us of a basic principle of bankruptcy law. The trustee's right to an asset under 11 U.S.C. § 541(a)(1)¹⁶ is no greater than the right of the debtor. In *Lyons*, the nonexempt asset was a fund on deposit in a retirement fund. The debtor was not entitled to the funds unless she retired, became disabled, or terminated her employment. Since none of these events had occurred at the date of the petition, the Seventh Circuit decided that the trustee was not entitled to a turnover order.¹⁷

The trustee now has three options when the debtor does not have a present right to an asset. The trustee may:

- (1) keep the estate open until the debtor becomes entitled to the asset,
- (2) attempt to sell the asset, or
- (3) abandon the asset.

None of these options holds much promise. It is not practical to keep the estate open except in unusual circumstances.¹⁸ Any attempt to sell will probably not attract much interest. As soon as the property is abandoned, the debtor may decide to quit her employment and withdraw her contributions. Although this is a troubling possibility, it is a risk accompanying any abandonment decision.

[T]here is always the possibility that the debtor will gain a great windfall by quitting her state job and getting the contributions

or consolidation. This issue was not properly raised in the court below. *See* 970 F.2d at 306 nn.9-11. It is unlikely that a court will find that this statute has been pre-empted by any provision in § 522. *Cf. In re Ondras*, 846 F.2d 33 (7th Cir. 1988); *Stevens v. Pike County Bank*, 829 F.2d 693 (8th Cir. 1987).

14. *Patterson v. Shumate*, 112 S. Ct. 2242 (1992).

15. 957 F.2d 444 (7th Cir. 1992). *Accord In re Sanders*, 969 F.2d 591 (7th Cir. 1992).

16. 11 U.S.C. § 541(a)(1) (1988).

17. 957 F.2d at 446.

18. The difficulty of keeping the estate open for a substantial period of time to administer an asset is noted in *Segal v. Rochelle*, 382 U.S. 375, 380-81 (1966). Courts have, however, required that the estate be kept open when the benefit to the estate is substantial. *See, e.g., In re Schauer*, 62 B.R. 526 (Bankr. Minn. 1986). *Cf. In re William Rakestraw Co.*, 450 F.2d 6 (9th Cir. 1971) (deciding that a claim comprising 20% of all claims cannot be disallowed simply because process of allowance would prolong administration of the estate).

back the day after the trustee abandons the contingent right to recover the SERS contributions. However, the risk is no greater than the risk that attends any decision by a Chapter 7 trustee to seek court authority to abandon property of the estate. Events can always happen that would make the value of the abandoned property increase after abandonment.¹⁹

III. AVOIDING POWERS

In theory, the core concept of a preference is easily stated. A debtor should not be able to favor a particular unsecured claimant on the eve of bankruptcy. In practice, application of the six-part statutory definition of a preference can be extraordinarily difficult, as illustrated in *In re Smith*.²⁰ In *Smith*, the debtor paid a creditor by check number one and deposited check number two in his account. Until check number two cleared, the debtor's account did not have a balance adequate to cover check number one. Nonetheless, the bank provisionally credited the debtor's account and paid check number one. Check number two bounced. The bank then charged back the provisional credit. The debtor filed for bankruptcy, and the trustee sought to recover the amount of check number one from the creditor pursuant to 11 U.S.C. § 547(b). The only issue on appeal was whether there had been a "transfer of an interest of the debtor in property."²¹

It is well-established that the transfer of an asset owned by a third party does not violate 11 U.S.C. § 547(b). If A satisfies the debtor's obligation with A's separate property, there is no preference.²² In *Smith*, the crucial issue was the nature of the bank's provisional credit. Was this credit something which belonged to the debtor or did it belong to the bank? Although Judges Cudahy and Fairchild thought that the credit represented something of value, they stopped short of finding that the credit created a property interest. However, when the bank honored check number one, "the provisional credit ripened into an interest in property of the debtor,"²³ and the payment by check was avoidable.

The majority's reasoning is unpersuasive. It ignores the distinction between property transfers achieved through the exercise of power (when

19. *In re Groves*, 120 B.R. 956, 966 (Bankr. N.D. Ill. 1990).

20. 966 F.2d 1527 (7th Cir. 1992).

21. *Id.* at 1529.

22. JAMES ANGELL MACLACHLAN, *HANDBOOK OF THE LAW OF BANKRUPTCY* 288 (1956). Recent decisions are collected and discussed in 4 *COLLIER ON BANKRUPTCY* (MB) ¶ 547.03(2) (15th ed. 1992).

23. 966 F.2d at 1535.

the asset belongs to the debtor) and property transfers achieved through the exercise of persuasion (when the asset belongs to someone else). Only the existence of a property transfer achieved by the exercise of power satisfies the requirement that the debtor's property be involved in the transaction.²⁴

Judge Flaum, in dissent, correctly focused "upon the degree to which the Debtor, as opposed to the Bank, had control over the funds at issue."²⁵ He pointed out that, up to the very moment of transfer, the debtor lacked the power to compel the bank to transfer the provisionally credited funds to the creditor:

The Debtor could *request*, but not *direct*, the Bank to honor its check . . . because the check was written on insufficient funds. That the Bank complied with the Debtor's request by transferring funds . . . was a matter of grace extended the Debtor by the Bank. This is all a way of saying that the Debtor never had dispositive control over the provisional credit.²⁶

Despite the cogent reasoning contained in Judge Flaum's dissent, other recent decisions are in accord with the majority's position.²⁷ In a

24. The majority's blurring of the difference between power and persuasion can also be seen in an analogy used to bolster its conclusion:

Still, our discussion of the Indiana Commercial Code is not entirely satisfying, since it fails to answer all of the questions definitively. One is still left pondering the conundrum: How is it possible that property of the Debtor appeared out of thin air, only to disappear in a matter of days? And if it disappeared on its own, how could its transfer have diminished the Debtor's estate? . . . [T]he Debtor never had more than \$164 in actual funds, so how could the payment . . . have been from the Debtor's property?

We think that some answers to these difficult questions may lie in considering the economic substance of the transaction at issue. In effect, the Debtor here obtained a loan from the Bank (through the check-kiting scheme) and used the loan proceeds to pay his debt We might say that the loan was unauthorized or obtained by fraud, but it was nevertheless in economic reality a loan. That is the best explanation for the Debtor's sudden acquisition of control over \$125,000 despite his previous actual wealth of only \$164, and of his ability to direct a valid \$121,000 payment The situation is the same as if the Debtor had gone to the Bank, taken out a five-day loan in cash and used the cash to pay his creditor

Id. at 1532.

In referring to a completed loan, the court did not choose the right analogy. The bank's provisional credit was not the equivalent of a loan. It was only a nonbinding commitment to extend credit. The debtor was able to pay the creditor only because the bank was willing to honor this commitment.

25. *Id.* at 1537 (Flaum, J., dissenting).

26. *Id.* at 1539 (emphasis in original) (Flaum, J., dissenting).

27. See, e.g., *In re Bohlen Enterprises*, 859 F.2d 561 (8th Cir. 1988) (2-1 decision); *In re Montgomery*, 136 B.R. 727 (M.D. Tenn. 1992).

check-kiting situation, the creditor does not present a strong case for retention of the funds since it received them only because of the bank's unwise decision to honor the overdraft. The most equitable resolution of the three party transaction would be to reject the preference challenge but allow the bank to recover the funds mistakenly paid to the creditor. Since this is not possible under existing law,²⁸ the recovery under 11 U.S.C. § 547(b) may be appealing as a second best alternative, even though it creates an anomaly in preference law.

IV. CHAPTER 13

Congress, believing that increased use of Chapter 13 would produce greater total bankruptcy distributions for unsecured creditors, sought to divert debtors from liquidation bankruptcy by making an adjustment of debts a more attractive option. For example, the discharge authorized by 11 U.S.C. § 1328(a)²⁹ following a successful completion of the plan is available to all debtors, without regard to whether they are eligible for a Chapter 7 discharge. Furthermore, as originally structured, this discharge was vastly superior to the one that could be obtained through Chapter 7 proceedings. It discharged all but one of the obligations excepted from discharge in 11 U.S.C. § 523.³⁰

Perhaps, Congress' original proposal was too generous. In any event, it seems that public support for a liberal discharge policy has lessened since 1979. Not surprisingly then, legislative activity and judicial decisions have combined to erode some of the pro-debtor features of Chapter 13. There now are three additional exceptions to the discharge authorized by § 1328(a).³¹ Furthermore, courts are restricting access to Chapter 13 through use of good faith concepts with regard both to the proposal of the plan and, more basically, the initiation of Chapter 13 proceedings. *In re Love*³² is an important decision because it is the Seventh Circuit's first consideration of the good faith requirement for initiation of Chapter 13 proceedings.

Robert Love was a tax protestor for five years before he filed for protection under Chapter 13 in late 1986. His proposed plan dealt with

28. *Demos v. Lyons*, 376 A.2d 1352 (N.J. Super. Ct. Law. Div. 1977). The *Demos* decision is discussed in 3 GEORGE E. PALMER, *THE LAW OF RESTITUTION* ¶ 14.24(e) (1992 Supp.) and JAMES J. WHITE & ROBERT S. SOMMERS, *UNIFORM COMMERCIAL CODE* § 17-2 (3d. ed. 1988).

29. 11 U.S.C. § 1328(a) (1988 & Supp. III 1991).

30. *Id.* § 523 (1988 & Supp. III 1991). Alimony and support claims remain excepted from discharge under § 523(a)(5).

31. Criminal restitution obligations and debts referred to in § 523(a)(8) and (9) were later added to the list of excepted obligations.

32. 957 F.2d 1350 (7th Cir. 1992).

only two debts, \$1,600 owed to an unsecured creditor, and a substantially larger tax obligation, some of which was a priority claim. The Chapter 13 case was dismissed pursuant to 11 U.S.C. § 1307(c) after the IRS objected that it had not been commenced in good faith. In affirming the action below, the court offered a number of observations concerning the good faith standard.

First, it decided that the burden of proof varies with the context in which the good faith issue is raised.³³ The plan proponent has the burden of demonstrating that good faith is present when the issue arises at confirmation. But when dismissal is sought, the objector must show that the bankruptcy has not been commenced in good faith.

Second, in each instance, good faith is to be determined by the totality of the circumstances.

[T]he focus of the good faith inquiry under both Section 1307 and Section 1325 is often whether the filing is fundamentally fair to creditors and more generally, is the filing fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code's provisions.

...
We realize that the standard of fundamental fairness does not provide a great deal of needed guidance. Unfortunately, however, we cannot completely alleviate the confusion and at the same time retain the advantages of the totality of circumstances test. This is because as our definition of good faith becomes more precise, the bankruptcy court has less discretion to weigh the evidence first hand in making good faith evaluations. In short, the down side of the totality of circumstances test is a degree of uncertainty.³⁴

The court then went on to offer a nonexhaustive list of factors to be considered in assessing a totality of the circumstances. Included in this list was "how the debt arose."³⁵ The court agreed with the bankruptcy judge's conclusion that bad faith was present in this case (1) because the debtor had not been forthright in presenting information to the court, and (2) because the bankruptcy was attributable to the debtor's prepetition misconduct in conducting a multiyear tax protest.³⁶

The court's willingness to use prebankruptcy misconduct as a justification for denial of access to Chapter 13 is quite troubling.

37. *Id.* at 1355.

34. *Id.* at 1357.

35. *Id.*

36. *Id.* at 1358.

Prebankruptcy misbehavior often creates an obligation that will be non-dischargeable in a Chapter 7 proceeding. At the same time, Congress' use of discharge incentives to attract debtors to Chapter 13 makes it likely that some plan proponents will have engaged in questionable prebankruptcy conduct. Denying such debtors access to Chapter 13 because of such prebankruptcy behavior is inconsistent with the legislative reliance on discharge incentives to attract debtors to this form of bankruptcy. Tax protestors, no less than other wrongdoers, are entitled to respond to the offer of a better discharge. Misconduct should not be used to support a finding of bad faith unless it is possible to identify misconduct related to concrete abuse of the bankruptcy process.³⁷

V. CONVERSION

Do postpetition, preconversion assets become property of the bankruptcy estate when a Chapter 13 debtor converts to Chapter 7? Although 11 U.S.C. § 348(a) provides that the date of case commencement remains unchanged upon conversion, it does not specify whether 11 U.S.C. §§ 541³⁸ or § 1306³⁹ defines the property of the estate in the converted case. In *In re Lybrook*,⁴⁰ the choice of section was critical since the debtor had inherited an asset more than 180 days after the commencement of a Chapter 13 case, but prior to conversion. If § 541 defined the estate following conversion, the inherited asset would not have been property of the estate. The trustee, however, successfully argued that this asset was part of the converted estate because § 1306 includes within the bankruptcy estate assets acquired during the course of the Chapter 13 proceeding.

No clear rule can be derived from the statutory language.⁴¹ Judge Posner, therefore, looked to the incentives he thought might be present in situations like this. He concluded that the inheritance should be part of the bankruptcy estate in order "to discourage strategic, opportunistic behavior that hurts creditors without advancing any legitimate interest of debtors."⁴² No doubt, inclusion of postpetition, preconversion assets

37. In Love's case, there was misconduct—failure to schedule assets and a failure to provide a realistic projection of disposable income. *Id.* "One of the surest ways for a Chapter 13 debtor to get into good faith problems is to misrepresent income, expenses, assets, or other matters." 1 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 5.17 (1992).

38. 11 U.S.C. § 541 (1988).

39. *Id.* § 1306 (1988).

40. 951 F.2d 136 (7th Cir. 1991).

41. See Robert J. Volpi, *Property of the Bankruptcy Estate After a Conversion from Chapter 13 to Chapter 7: The Need for a Definite Answer*, 68 IND. L.J. 489, 496-504 (1993).

42. 951 F.2d at 137.

in the converted estate eliminates an incentive to convert in a situation such as this. It also creates a powerful disincentive to starting out in Chapter 13. After *Lybrook*, any debtor aware of the possibility of an inheritance should pass up Chapter 13 and file immediately under Chapter 7. Then, when 180 days passes, there will be no further risk of losing the inheritance.

The net impact of these various incentives is unclear and the jurisprudence of conversion is a collection of confusing, and often conflicting, authorities.⁴³ For example, one Eighth Circuit opinion cited by Judge Posner in support of his position is one which permits opportunistic behavior by a debtor in the context of a different legal controversy.⁴⁴ Confusion is present in this area of the law for several reasons. First, there is judicial disagreement over whether and when debtors ought to be permitted to gain an advantage by moving between chapters. Second, given the variety of issues which can arise upon conversion, and the conflicting policy considerations presented by various fact patterns, it is unlikely that one or two simple rules will ever be sufficient to spell out all the consequences of conversion in a satisfactory fashion.⁴⁵

Let us assume that it is necessary to regulate movement between chapters. There are two ways to deal with the problem of opportunistic change: (1) assign consequences to the act of conversion which limit the potential for gain through inter-chapter movement, or (2) restrict the situations in which conversion can take place. The former approach affects all converting debtors including those who do not have an opportunistic motivation.⁴⁶ *Lybrook*, for example, attempts to control the problem of opportunistic conversion by adopting a uniform rule that property of the estate is defined by § 1306. Another, and possibly superior, approach to the problem of opportunistic movement between chapters may eventually be found in rules limiting the debtor's unrestricted right to convert from Chapter 13 to Chapter 7.⁴⁷

43. See generally 2 COLLIER ON BANKRUPTCY (MB) ¶ 348.01-07 (15th ed. 1992).

44. *In re Lindberg*, 735 F.2d 1087 (8th Cir. 1984) (allowing a different homestead exemption at the time of conversion than the one the debtors designated at the commencement of their bankruptcy proceedings).

45. For example, the Tenth Circuit has recently indicated that different rules will control the consequences of conversion from Chapters 13 and 11 to Chapter 7. See *In re Calder*, 973 F.2d 862, 866 n.5 (10th Cir. 1992).

46. Assume that a Chapter 13 debtor inherits property as in *Lybrook*. He also becomes disabled, loses his job, no longer has sufficient regular income to fund his plan, and converts to Chapter 7. *Lybrook* calls for inclusion of the inheritance in his converted Chapter 7 estate even though the conversion is not opportunistic.

47. See Volpi *supra* note 41, at 519-22.

VI. PROCEDURE

The post-*Northern Pipeline Co. v. Marathon Pipeline Co.*⁴⁸ bifurcation of authority⁴⁹ to adjudicate continues to provide litigants with the opportunity to delay decision making by forcing withdrawal of controversies from the bankruptcy judge. One possible strategy is to demand a jury trial. If the demand is well-founded, *In re Grabill Corp.*⁵⁰ now aligns the Seventh Circuit with the majority view that withdrawal is mandatory. The bankruptcy judge is not authorized to conduct a jury trial.

*In re Edwards*⁵¹ is the other notable procedural decision. In this case, a mortgagee had not received notice of a sale free of lien authorized under 11 U.S.C. § 363(f). It sought postjudgment relief pursuant to Federal Rule of Civil Procedure 60(b).⁵² Because more than one year had passed since the sale, the mortgagee was forced to argue that, absent proper notice, the sale was void.⁵³

Judge Posner, writing for the court, refused to adopt the view that lack of notice alone warranted vacating the sale.

We are left with the practical question, in what circumstances can a civil judgment be set aside without limit of time and without regard to the harm of innocent third parties? (citation omitted) The answer requires a consideration of competing interests rather than a formula.

To take away a person's property—and a lien is property—without compensation or even notice is pretty shocking, but we have property rights on both sides of the equation here, since Guernsey wants to take away property that Noble bought and Northwest financed, without compensating them for their loss. As we said before, the liquidation of bankrupt estates will be impeded if the bonafide purchaser cannot obtain a good title, and creditors will suffer. The strong policy of finality of bankruptcy sales embodied in section 363(m) provides, in turn, strong support for the principle that a bona fide purchaser at a bankruptcy sale gets good title (citations omitted) even if the section

48. 458 U.S. 50 (1982).

49. 28 U.S.C. § 157 (1988).

50. 976 F.2d 1126 (7th Cir. 1992).

51. 962 F.2d 641 (7th Cir. 1992).

52. Bankruptcy Rule 9024 provides (with three exceptions) that Federal Rule of Civil Procedure 60(b) governs requests for postjudgment relief in bankruptcy proceedings.

53. There is no specific time limit on an application for relief from a "void" judgment. FED. R. CIV. P. 60(b)(4).

does not of its own force preclude collateral attack on such sales. . . . Rule 60(b) must be interpreted in light of this policy. The policy would mean rather little if years after the sale a secured creditor could undo it by showing that through some slip-up he hadn't got notice of it.⁵⁴

There is Seventh Circuit authority both supporting⁵⁵ and opposing⁵⁶ the view that failure to give notice results in a "void" judgment. The court in this instance opted to sustain the sale because (1) it thought that the policy of finality was the most important consideration, and (2) it doubted that the objecting creditor had been damaged by the failure to give proper notice.⁵⁷

54. 962 F.2d at 644-45.

55. *Rodd v. Region Constr. Co.*, 783 F.2d 89 (7th Cir. 1986) (improper service of process).

56. *In re Whitney-Forbes, Inc.*, 770 F.2d 692 (7th Cir. 1985) (failure to give notice of bankruptcy sale).

57. 962 F.2d at 645-46.

Developments in Contract and Commercial Law

ROBERT G. SOLLOWAY*

INTRODUCTION

This Article discusses some important recent Indiana decisions concerning contract law and the Uniform Commercial Code (UCC). The cases discussed include decisions from both Indiana courts and federal courts construing Indiana law.

I. CONTRACTS—INDEMNITY PROVISIONS

The districts of Indiana's courts of appeals are split concerning the recovery of attorney's fees by an indemnitee suing to enforce an indemnity contract. One recent case, *Dale Bland Trucking, Inc. v. Kiger*,¹ discussed such a provision in a semi-truck lease and held that the fees were not available unless specifically provided for by contract.²

The owner of the semi-truck, Kiger, agreed to indemnify Dale Bland Trucking, the lessee, "from any and all claims, suits, losses, fines, or other expenses arising out of, based upon or incurred because of injury to any person or persons or damage to any property sustained by reason of negligence or recklessness on the part of [Kiger], its agents, servants, or employees."³ An accident involving the truck occurred while being operated by one of Kiger's employees. Several lawsuits were filed against Dale Bland. Kiger and its insurer refused to defend the suits on Dale Bland's behalf. Dale Bland defended itself in the suits, incurred attorney's fees, and was ordered to pay damages to several of the plaintiffs.⁴

Following the suits, Dale Bland sued Kiger and its insurer for failure to indemnify and defend Dale Bland. The trial court awarded Dale Bland the amount it was required to pay to third-party plaintiffs, plus attorney's fees incurred in defending those suits. However, the court refused to award Dale Bland the attorney's fees incurred in bringing the action against Kiger and its insurer.⁵

* Associate, Klineman, Rose, Wolf & Wallack, P.C., Indianapolis, Indiana. B.A. and B.S., 1986, Purdue University; J.D., 1989, Indiana University School of Law—Indianapolis.

1. 598 N.E.2d 1103 (Ind. Ct. App. 1992).

2. *Id.* at 1106.

3. *Id.*

4. *Id.* at 1105.

5. *Id.*

The court of appeals affirmed the trial court's decision. The court of appeals noted that Indiana follows the American rule in awarding attorney's fees. "In Indiana, each party to litigation must pay for its own attorney's fees, absent a statute or agreement authorizing such an award."⁶ The court then found that the indemnity clause in the lease, quoted above, did not specifically refer to the recovery of attorney's fees in any action to enforce the indemnity; therefore, attorney's fees could not be awarded to Dale Bland.⁷

Dale Bland argued to the court of appeals that the 1983 case of *Zebrowski and Associates, Inc. v. City of Indianapolis*⁸ supported its argument that the indemnitee may recover attorney's fees incurred in prosecuting an indemnity claim. The contract at issue in *Zebrowski* covered attorney's fees, but did not specifically state that it covered attorney's fees incurred in prosecuting an action to enforce the indemnity. However, the plaintiff only sought and won attorney's fees incurred in defending underlying tort actions. The defendant appealed, arguing the amount of the award was not reasonable.⁹ In dicta, the court stated that an "indemnitee may recover attorney fees from the indemnitor incurred through an original action which is settled, and also for the cost of prosecuting the indemnity clause."¹⁰ However, the court in *Dale Bland* determined that *Zebrowski* did not support Dale Bland's contention.¹¹

It seems reasonable that attorney's fees incurred in prosecuting an indemnity clause in a contract, when the indemnitor has refused to indemnify and defend an indemnitee in some underlying action, would come within the intent of a clause which indemnifies against "any and all costs and expenses incurred by the indemnitee as a result of the actions of the indemnitor." However, the *Dale Bland* decision unequivocally holds that unless a contract explicitly awards attorney's fees incurred while enforcing an indemnity, there can be no award of such fees.¹² Thus, attorney's fees are not treated like other costs an indemnitee faces when the indemnitor refuses to live up to its part of the bargain by not defending the indemnitee in the underlying action. Accordingly, practitioners drafting contracts governed by Indiana law that contain indemnity provisions should state explicitly that the indemnitee will recover attorney's fees incurred while enforcing the indemnity provisions.

6. *Id.*

7. *Id.* at 1106.

8. 457 N.E.2d 259 (Ind. Ct. App. 1983).

9. *Id.* at 264.

10. *Id.* (citing *Price v. Amoco Oil Co.*, 524 F. Supp. 364 (S.D. Ind. 1981)).

11. 598 N.E.2d at 1105.

12. *Id.* at 1106.

A second case within the Survey period, *Essex Group, Inc. v. Nill*,¹³ further illuminates the availability of attorney's fees in an indemnity action. In *Essex*, the court of appeals relied on *Zebrowski* in stating that an indemnitee may recover the cost of enforcing an indemnity clause. However, the contract provisions at issue in *Essex* provided only that the indemnitor "shall indemnify and hold harmless [the indemnitee] from all claims, demands, liabilities, loss or damage (including reasonable counsel fees and other reasonable out-of-pocket expenses) arising subsequent to the Closing out of any breach of any such representation, warranty, covenant or agreement by the [indemnitor]."¹⁴

Because this case arose from a trial court order dismissing the indemnitee's claim, the facts necessary to resolve the dispute had not been fully entertained by the trial court or the appellate court. However, the *Essex* decision seems to imply that if the lower court determines the indemnitee is entitled to indemnification, then it will also be entitled to recover reasonable attorney's fees both for defending any underlying litigation and for prosecuting the indemnity clause. Although this appears to be the law as stated in *dicta* in the *Zebrowski* case, the *Dale Bland* case clearly holds otherwise.

Therefore, the districts of the Indiana Court of Appeals¹⁵ lack uniformity regarding the specificity required in indemnity contracts providing for attorney's fees to be recovered by indemnitees. Hopefully, the Indiana Supreme Court will entertain such a case in the near future. In the meantime, prudent practitioners should be specific in drafting indemnity provisions, explicitly stating that attorney's fees incurred in enforcing the indemnity provision are recoverable.

II. CONTRACTS—CONSTRUCTION AGAINST DRAFTER

Several cases arose during the Survey period which reaffirm the well-known rule that an ambiguous contract is construed against the party who prepared the ambiguous document or language. The first case is *Woodbridge Place Apartments v. Washington Square Capital, Inc.*¹⁶ The specific facts of this case are discussed later in this Article.¹⁷ In this case, the United States Court of Appeals for the Seventh Circuit found that provisions in a loan application for refunding the borrower's deposit

13. 594 N.E.2d 503 (Ind. Ct. App. 1992).

14. *Id.* at 506.

15. *Zebrowski* and *Dale Bland* were each decided by the first district, whereas *Essex* was decided by the third district.

16. 965 F.2d 1429 (7th Cir. 1992).

17. See text accompanying notes 26-28 *infra*.

were drafted by the lender. The court found the provisions were ambiguous and accepted the interpretation proposed by the borrower. The lender proposed several different interpretations of the contract provisions; however, the Seventh Circuit found that "Indiana courts invoke the cardinal rule of construction that 'ambiguities in a contract are to be strictly construed against the party who prepared the contract.'" ¹⁸

The second case is *Boswell Grain & Elevator, Inc. v. Kentland Elevator & Supply, Inc.* ¹⁹ This case concerned the language of an option to purchase "grain facilities" contained within a lease. Kentland rented two grain elevators from Boswell Grain, the landlord. The lease contained an option to purchase "the grain facilities" on proper notice given by Kentland. Kentland gave such notice and tendered the purchase price, but Boswell Grain never tendered the executed deeds for the "grain facilities." ²⁰ The ambiguity in the contract concerned the definition of the term "grain facilities." Kentland contended that the term included all of the machinery and equipment at the sites, while Boswell Grain contended that the term excluded certain items of machinery and equipment. Applying the general rule that ambiguous contracts are construed against the preparer, the court upheld the broader interpretation of the term "grain facilities" as proposed by Kentland. ²¹

A third case using this rule of construction is *INB Banking Co. v. Opportunity Options, Inc.* ²² In this case, INB attempted to foreclose a mortgage granted to secure a debt. INB also tried to set off certain amounts against the debtor's accounts held at INB after the debtor defaulted. The note provided that:

If I do not pay the full amount of each monthly payment on time, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date I will be in default. That date must be at least 30 days after the date on which the notice is mailed to me. ²³

The debtor failed to make two installments. INB sent the debtor letters stating that if the installments were not paid by a certain date, INB would begin legal action. The installments were not paid by that date, and INB then set off certain amounts in excess of the amount of the two late installments against the debtor's checking accounts at INB. The

18. 965 F.2d at 1439 (quoting *English Coal Co., Inc. v. Durcholz*, 422 N.E.2d 302, 309 (Ind. Ct. App. 1981)).

19. 593 N.E.2d 1224 (Ind. Ct. App. 1992).

20. *Id.* at 1225.

21. *Id.* at 1228.

22. 598 N.E.2d 580 (Ind. Ct. App. 1992).

23. *Id.* at 582-83.

debtor objected on the basis that INB did not give the thirty-day written notice and that the note required such notice before INB could accelerate the debt. INB countered that the language of the note—"may send me a written notice"—did not create a duty to send notice, but was simply permissive on INB's part. The court found that both interpretations were reasonable and that the note was therefore ambiguous. Because INB drafted the note, the court found the notice was required as the debtor contended.²⁴

These cases underscore the potency of this rule of construction. Nearly every ambiguous contract can be resolved using this rule by accepting a reasonable interpretation of the contract language offered by the nondrafter. The only real issue to be decided in these cases is which party prepared the contract. In *Opportunity Options* and *Woodbridge*, it is clear the lenders in each case prepared the contracts in issue, because the contracts were the lenders' forms. However, the *Boswell* case presents a different situation. In that case, the landlord, Boswell Grain, argued this rule of construction should be "inapplicable where the contract was prepared with the aid and approval of and under the scrutiny of counsel for each of the parties thereto."²⁵ Boswell Grain could not cite Indiana precedent for this argument and the court of appeals noted that "this exception has not heretofore been recognized in Indiana."²⁶ The court of appeals indicated in *Boswell Grain* that there was some negotiation of the terms of the lease and option. However, Boswell Grain's attorneys prepared a draft of the contract following negotiations and submitted the draft to Kentland to sign. Thus, the court of appeals found that even if such an exception did exist in Indiana, the facts of *Boswell* would not fall within the exception.

These cases highlight the necessity for practitioners whose clients use form contracts and instruments to draft language which clearly expresses the clients' intent. Any ambiguity in these types of contracts and instruments could be fatal to the clients' ability to obtain the benefit of their bargains.

III. CONTRACTS—IMPLIED DUTY OF GOOD FAITH

In *Woodbridge Place Apartments v. Washington Square Capital, Inc.*,²⁷ the United States Court of Appeals for the Seventh Circuit construed a contract under Indiana law. The case arose from a failed attempt by Woodbridge Place to refinance Woodbridge Place Apartments,

24. *Id.* at 584.

25. *Boswell Grain & Elevator, Inc. v. Ken Hand Elevator & Supply, Inc.*, 593 N.E.2d 1224, 1228 (Ind. Ct. App. 1992) (citing *Beck v. F.W. Woolworth Co.*, 111 F. Supp. 824 (N.D. Iowa 1953)).

26. *Id.*

27. 965 F.2d 1429 (7th Cir. 1992).

a 192-unit apartment complex in Evansville, Indiana. Woodbridge Place applied for a loan from Washington Square. Woodbridge Place was required to make a standby deposit of three percent of the loan amount. The application provided the deposit would be returned to Woodbridge Place after the loan was made. If the loan was not made, Woodbridge Place was to have no right to a refund unless Washington Square wrongfully refused to make the loan.²⁸

The loan was not made because conditions relating to the apartments were not satisfied. Woodbridge Place sought the return of the deposit. Woodbridge Place prevailed in the lower court, which held that the deposit penalized Woodbridge Place and was unenforceable as a liquidated damages provision. It ordered the refund of the deposit to Woodbridge Place. Washington Square appealed that order to the Seventh Circuit.²⁹

The parties agreed the actual language of the loan application contemplated a refund of the deposit only if the lender wrongfully refused to make the loan. However, Woodbridge Place argued that despite the language of the application, the lender's retention of the deposit amounted to a penalty provision or an unenforceable attempt to provide for damages. The lender countered by arguing that the deposit constituted consideration. The problem with this loan application arose because the application itself did not characterize the deposit as either consideration for an option, consideration for a commitment, or a damages provision. Therefore, the court found that the agreement was ambiguous on this point.³⁰

The most interesting aspect of this case arises in the court's discussion of whether the deposit constitutes consideration for an option contract. The lender made this argument in support of its retention of the deposit. The court had to decide whether, under Indiana law, the loan application constituted an option contract or a conditional bilateral contract. Again, the application itself did not contain any language specifically resolving this issue. The court found that in order for the loan application to constitute an option agreement, only the lender and not the borrower could be bound. "[I]f both the borrower and lenders are bound to carry through with the loan upon satisfaction of the specified conditions, then the loan commitment could only be a bilateral conditional agreement."³¹ The court stated that when the language of an agreement fails to resolve the ambiguity as to whether a loan commitment is a bilateral conditional

28. *Id.* at 1432-33.

29. *Id.* at 1433.

30. *Id.* at 1435-36.

31. *Id.* at 1437.

contract or an option, some jurisdictions, such as New York, presume that the loan commitment constitutes a bilateral agreement.³² Other jurisdictions, such as California³³ and Texas,³⁴ presume it constitutes an option contract in which only the borrower is obligated. Still other jurisdictions, such as Illinois,³⁵ presume that neither side is bound.

The court stated that *Woodbridge Place* was a case of first impression in Indiana, as no Indiana cases regarding loan commitments were presumed to be actions on an option or bilateral contracts. The court then applied, by analogy, two Indiana Court of Appeals cases regarding conditional real estate contracts. The first case the court cited was *Keliher v. Cure*,³⁶ in which the Indiana Court of Appeals decided that a seller is entitled to retain an earnest money deposit after the buyer decided not to complete the sale. The second case cited by the court was *Billman v. Hensel*,³⁷ in which the court held that under a real estate contract which was "subject to financing" the buyer has "an implied obligation to make a reasonable and good faith effort to satisfy the condition."³⁸ The Seventh Circuit stated that both *Keliher* and *Billman* represented contracts similar to the loan application in *Woodbridge Place* because the contracts involved in *Keliher* and *Billman* did not specify whether the buyer was bound to the contract, and because both agreements required earnest money deposits similar to the stand-by deposit in *Woodbridge Place*.³⁹

In *Keliher*, the court's reliance is plainly unwarranted. The *Keliher* contract provided that "[p]urchaser agrees to make application for any financing necessary to complete this transaction."⁴⁰ Clearly, the buyers in *Keliher* specifically obligated themselves to apply for the necessary financing. This is vastly different from a situation in which consummation of a transaction is merely subject to financing and the buyer is not specifically obligated to apply for financing, which was the case in *Billman*. *Keliher* involved a bilateral agreement in which the buyers obligated themselves to perform.

32. See, e.g., *Murphy v. Empire of Am.*, FSA, 746 F.2d 931 (2d Cir. 1984).

33. See, e.g., *Lowe v. Massachusetts Mut. Life Ins. Co.*, 127 Cal. Rptr. 23 (Cal. Ct. App. 1976).

34. See, e.g., *B.F. Saul Real Estate Inv. Trust v. McGovern*, 683 S.W.2d 531 (Tex. Ct. App. 1984).

35. See, e.g., *Runnemeede Owners, Inc. v. Crest Mortgage Corp.*, 861 F.2d 1053 (7th Cir. 1988).

36. 534 N.E.2d 1133 (Ind. Ct. App. 1989).

37. 391 N.E.2d 671 (Ind. Ct. App. 1979).

38. *Id.* at 673.

39. *Woodbridge Place Apartments v. Washington Square Capital, Inc.*, 965 F.2d 1429, 1438 (7th Cir. 1992).

40. 534 N.E.2d at 1135.

However, when using *Billman*, the *Woodbridge Place* court's reliance is well placed. The contract at issue in that case merely provided that consummation of the contract was subject to the buyer's ability to secure financing. In *Billman*, the Indiana Court of Appeals relied on jurisdictions outside Indiana to find the buyers had an implied obligation to make a reasonable and good faith effort to obtain financing. There is no prior Indiana precedent for this position. The court in *Billman* even recognized that another Indiana Court of Appeals decision specifically refused to impose an implied obligation of good faith.⁴¹

The court in *Woodbridge Place* does not discuss the implications of the 1990 Indiana Supreme Court case of *First Federal Savings Bank of Indiana v. Key Markets, Inc.*⁴² In *Key Markets*, the court reversed the Indiana Court of Appeals, which had imposed a duty of reasonableness upon a landlord who is asked to consent to an assignment of a lease. The lease simply provided that, with certain exceptions, the tenant could not assign the lease without the landlord's consent.⁴³ The supreme court held that the court of appeals used an improper standard to reach this conclusion because courts cannot "require a party acting pursuant to such a contract to be 'reasonable' 'fair' or show 'good faith' cooperation."⁴⁴ Therefore, it is rather clear that Indiana law, in cases not governed by the Uniform Commercial Code (UCC), will not impose general duties of good faith or reasonableness on a party to a contract.

The Seventh Circuit in *Woodbridge Place* created an implied covenant of good faith on the part of Woodbridge Place to see that all conditions to the loan application were satisfied. Based on this duty, the court found the contract was a bilateral conditional contract rather than an option contract and, therefore, the deposit was not consideration for an option agreement. Having found a bilateral contract, the court held the deposit retention provision was a liquidated damages provision that could only apply if Woodbridge Place were in default. Because the

41. 391 N.E.2d at 673 (citing *Blakely v. Currence*, 361 N.E.2d 921 (Ind. Ct. App. 1977)).

42. 559 N.E.2d 600 (Ind. 1990).

43. *Id.* at 601.

44. *Id.* at 604. The Indiana Supreme Court further stated:

[the] proper posture for the court is to find and enforce the contract as it is written and leave the parties where it finds them. It is only where the intentions of the parties cannot be readily ascertained because of ambiguity or inconsistency in the terms of a contract or in relation to extrinsic evidence that a court may have to presume the parties were acting reasonably and in good faith *in entering into* the contract.

Id. (emphasis added). Therefore, the court should never imply an obligation of good faith but may presume the parties are acting in good faith in order to ascertain their intent in any given contract.

failure to close the loan was due to the failure of certain conditions, and not a breach by Woodbridge Place of its obligations, the damage provision could not be enforced and Woodbridge Place was entitled to a refund of the deposit.⁴⁵

In so holding, the Seventh Circuit failed to recognize relevant Indiana precedent, including specifically *Key Markets*. Indiana courts would have difficulty obligating Woodbridge Place to an implied duty of good faith. The loan application should have been construed under Indiana law as an option contract, in which the prospective borrower is not bound to carry through with the loan. The deposit should have been deemed consideration for this option, which need not be returned by the lender.

IV. SECURED TRANSACTIONS—PRIORITY OF INTERESTS

The recent case of *Union Federal Savings Bank v. INB Banking Co. Southwest*⁴⁶ decides an issue of first impression in Indiana. The case involved a dispute between two parties with competing security interests in a boat. The first owner of the boat was Stephen K. Finney who bought the boat in 1986 with a loan from the Peoples Savings Bank of Evansville, Indiana, the predecessor in interest of INB Banking Company Southwest. Finney used the boat for personal purposes and kept it docked on the Ohio River in Henderson County, Kentucky. On February 26, 1986, Peoples filed a financing statement for the boat with the county clerk of Henderson County, Kentucky. The boat was registered with the Commonwealth of Kentucky.⁴⁷

In late 1987, Finney decided to sell the boat and entered negotiations with Ronald D. Flick. Flick obtained a loan from Union Federal Savings Bank to purchase the boat. On January 18, 1988, Union Federal loaned Flick the money to buy the boat. Flick executed a financing statement giving Union Federal a security interest in the boat which was still in Kentucky. In order to save sales tax, Finney caused Whitewater Ford Lincoln Mercury, Inc., a corporation of which Flick was the president and chief operating officer, to purchase the boat. On January 27, 1988, Whitewater purchased the boat from Finney. Flick then moved the boat to Indiana and two days later, on January 30, 1988, Flick bought the boat from Whitewater.⁴⁸

At this time, Indiana required certificates of title for boats. Therefore, on March 23, 1988, Flick obtained an Indiana certificate of title for

45. *Woodbridge Place Apartments v. Washington Square Capital, Inc.*, 965 F.2d 1429, 1438-41 (7th Cir. 1992).

46. 582 N.E.2d 426 (Ind. Ct. App. 1991).

47. *Id.* at 427. The registration of the boat in Kentucky was, at the time, different from obtaining a certificate of title for the boat. *Id.* at 429, n.3.

48. *Id.* at 428.

the boat. The certificate did not list either Peoples or Union Federal as a secured party. However, on August 29, 1989, a new Indiana certificate of title was issued which showed, for the first time, Union Federal as the first lien holder. Peoples was never noted as a secured party on the Indiana certificate of title.⁴⁹

On March 31, 1988, approximately two months after the sale to Flick and removal of the boat to Indiana, Peoples learned that the boat had been sold by Finney. However, Peoples made no inquiry about the identity of the new owner or the boat's whereabouts. It was not until July 24, 1989, that Peoples advised Flick that it claimed a security interest in the boat. However, Peoples never filed any financing statement in Indiana or otherwise tried to perfect its security interest in the boat in Indiana.⁵⁰

In September 1989, Peoples filed a complaint against both Flick and Finney, seeking to foreclose its security interest in the boat. However, the complaint was dismissed against Finney because he had filed a bankruptcy petition. Peoples later amended its complaint to add Union Federal as a competing secured party. The trial court entered judgment in favor of Peoples against both Flick and Union Federal.⁵¹

The court of appeals misread Indiana's version of Article 9 of the UCC,⁵² and incorrectly affirmed the trial court. The court of appeals began its analysis by noting that "Peoples properly perfected its security interest in the boat in Kentucky on February 26, 1987."⁵³ The court then correctly discussed section 103 of Article 9 of Indiana's UCC,⁵⁴ which provides as follows:

(d) When collateral is brought into and kept in this state while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed, the security interest remains perfected, but if action is required by [Indiana Code section] 26-1-9-301 through [section] 26-1-9-318 to perfect the security interest:

(i) If the action is not taken before the expiration of the period of perfection in the other jurisdiction or the end of four (4) months after the collateral is brought into this state, whichever period first expires, the security interest becomes unperfected at

49. *Id.*

50. *Id.* at 428.

51. *Id.*

52. IND. CODE §§ 26-1-9-101 to -507 (1992). For all relevant purposes, Indiana's version of Article 9 of the UCC is identical to the official text of Article 9 of the Uniform Commercial Code.

53. *Union Federal*, 582 N.E.2d. at 429.

54. IND. CODE § 26-1-9-103 (1988).

the end of that period and is thereafter deemed to have been unperfected as against a person who became a purchaser after removal.⁵⁵

The court relied on the last clause of section 103(1)(d)(i) to find the real issue in this case “is whether the boat was purchased before or after it was moved to Indiana.”⁵⁶ The court then proceeded through an excellent discussion of whether Union Federal was a “purchaser” under the UCC and at what time it became a “purchaser.”⁵⁷ The court correctly found that Union Federal became a purchaser of the boat on January 27, 1988, the date that its security interest in the boat attached.⁵⁸ After finding that Union Federal was a “purchaser” of the boat prior to its removal to Indiana, the court held that section 103(1)(d) of Article 9 of the UCC “did not apply, and Peoples’s [sic] security interest was not unperfected against Union Federal even though Peoples did not reperfect its interest in Indiana.”⁵⁹

This is where the court of appeals misreads the UCC. Section 103(1)(d) of Article 9 of the UCC provides that the prior secured party’s security interest is “deemed to have been unperfected as against a person who became a purchaser after removal.”⁶⁰ Because Union Federal is not “a person who became a purchaser after removal,” this clause of section 103 does not apply to this case. However, the remaining portions of section 103(d) do apply. This means that if the prior secured party does not take action before the expiration of the four-month period after the collateral is removed from the state in which the party’s security interest

55. *Id.* § 26-1-9-103(1)(d). Section 103(d) of Article 9 of the UCC is applicable in this situation through § 103(2)(c) of Article 9 of the UCC, which provides that, with a certain exception not relevant here, a security interest which is perfected in another jurisdiction (other than by notation on a certificate of title and goods removed to Indiana and thereafter covered by a certificate of title in Indiana) is subject to the rules stated in sub-section 1(d) of section 103. IND. CODE § 26-1-9-103(2)(c).

56. *Union Federal*, 582 N.E.2d at 430.

57. *Id.* The term “purchase” is defined in the UCC as including “taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift, or any other voluntary transaction creating an interest in property.” IND. CODE § 26-1-1-201(32) (1988 & Supp. 1992). Consequently, the term “purchaser” means a person who takes by purchase. *Id.* § 26-1-1-201(33) (Supp. 1992). Therefore, a secured party is clearly a “purchaser” under the UCC.

58. A security interest attaches to the collateral once the following three conditions exist: (1) the debtor has signed a security agreement which contains a description of the collateral, (2) value has been given, and (3) the debtor has rights in the collateral. IND. CODE § 26-1-9-203 (1988). In this case, Flick signed the security agreement on January 18, 1988, and Union Federal, at that time, gave Flick the proceeds of the loan. Flick acquired rights to the boat when, pursuant to an oral agreement with Whitewater, he obtained possession of the boat on Jan. 27, 1988. *Union Federal*, 582 N.E.2d at 430.

59. *Union Federal*, 582 N.E.2d at 431.

60. IND. CODE § 26-1-9-103(1)(d)(i) (1988).

is perfected, that security interest becomes unperfected at the end of that four-month period. Therefore, Peoples' security interest in the boat became unperfected four months after the boat was moved by Flick to Indiana.

Section 103 of Article 9 requires a secured party holding a perfected security interest in one state to take action in another state to maintain its perfected security interest. If the secured party fails to reperfect its interest, the disputes over priority with other interested parties must be governed by the other sections of Article 9. Section 301 of Article 9 states that "an unperfected security interest is subordinate to the rights of: (a) persons entitled to priority under [Indiana Code §] 26-1-9-312."⁶¹ Section 312(5)(a) of Article 9 provides:

Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection.⁶²

Thus, if the secured party with a perfected interest in the original jurisdiction fails to reperfect its interest in the new jurisdiction within the four-month period, any junior secured creditor can obtain priority if the junior secured party perfects its security interest in the new jurisdiction before the senior secured party does. If the junior secured party does not perfect its interest, then the senior secured party will prevail because its interest attached first.⁶³ However, in *Union Federal*, Union Federal perfected its security interest in Indiana by having it noted on the certificate of title. Accordingly, Union Federal's security interest should have been given priority over Peoples' prior security interest.

The official comment to Section 103 of Article 9 of the UCC states the rationale behind the provisions of Section 103:

The four-month period is long enough for a secured party to discover in most cases that the collateral has been removed and refile in this state; thereafter, if he has not done so, his interest, although originally perfected in the jurisdiction from which the collateral was removed, is subject to defeat here by purchasers of the collateral. . . . The rights of a purchaser with a security interest against an unperfected security interest are governed by Section 9-312. In case of delay beyond the four-

61. *Id.* § 26-1-9-301(1)(a).

62. *Id.* § 26-1-9-312(5)(a).

63. *Id.* § 26-1-9-312(5)(b).

month, there is no “relation back;” and this is also true where the security interest is perfected for the first time in this state.⁶⁴

Noted commentators James White and Robert Summers explain a hypothetical situation quite similar to *Union Federal*. They assume a senior party and a junior party who have perfected security interests in state one. The collateral is moved to state two. The junior party quickly reperfects its security interest in state two while the senior party does nothing. White and Summers conclude:

One might argue [that the junior secured party], having notice of the original security claim, has no greater equities than those of a lien creditor whose claim arises within the four month period in the new state. On the other hand [§ 103(1)](d)(i) states that the security interest is unperfected at the end of four months and the last clause of (d)(i) that otherwise would subordinate the lien creditor does not explicitly apply here. We are not confident about what the proper outcome should be in such a case. We tend to favor the diligent junior creditor; on the other hand we can certainly see situations in which the senior secured creditor should win because, for example, the junior might have encouraged the debtor to move the goods to enable him to achieve priority.⁶⁵

The *Union Federal* case is not quite identical to the hypothetical raised by White and Summers. The court of appeals in *Union Federal* stated that *Union Federal* had no actual knowledge of Peoples’ security interest. On the other hand, Peoples knew of the sale of the boat within the four-month period but made no attempt whatsoever to determine who the new owner was or where the boat was. *Union Federal* is a case in which two competing secured creditors, ignorant of the existence of each others’ interests, attempt to perfect their own interests. The court favors the senior party because it was the first to file. In order to favor the senior party, the court must bend the UCC in a way it cannot be bent. Both parties are at fault in this case—*Union Federal* for failing to discover Peoples’ original financing statement, and Peoples for failing to reperfect in Indiana. It is a difficult case, but the UCC and its comment, as well as noted commentators such as White and Summers, clearly reward the more diligent secured creditor.

64. U.C.C. § 9-103 cmt. 7 (1992), 3 U.L.A. 151 (1992); see also 2 JAMES WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 395 (3d ed. 1988).

65. WHITE & SUMMERS, *supra* note 64, § 397.

V. SECURED TRANSACTIONS—PRIORITY OF SECURITY INTEREST AS
AGAINST CORPORATE EMPLOYEE LIEN

A second case was decided within the Survey period concerning the priority of a security interest perfected under Article 9 of the UCC. *Ameritrust National Bank, Michiana v. Domore Corp.*⁶⁶ does not concern competing priorities of two perfected security interests, but rather the priority of a perfected security interest vis-a-vis a corporate employees' lien.⁶⁷ Indiana has been blessed with the corporate employee lien statute since 1877 in substantially the same form as it exists today.⁶⁸ The lien statute gives all employees of any corporation doing business in Indiana a first and prior lien upon the property of the corporation and its earnings. The lien amount is for all work performed by the employees from the date of their employment. For the employees to acquire the lien, they must file notice with the recorder's office of the county where the corporation is located or doing business. The notice of intent to hold the lien may be filed regardless of whether the employee's claim is then due. The lien relates back to the date of employment of the employee by the corporation, or to any subsequent date, at the employee's election.

The corporate employee's lien has priority over all liens created later, except for other employee liens, over which there is no such priority. One exception to the priority of the lien exists:

Where any person, other than an employee, shall acquire a lien upon the corporate property of any corporation located or doing business in this state, and such lien remain a matter of record for a period of sixty (60) days, in any county in this state where such corporation is located or doing business, and no lien shall have been acquired by any employee of such corporation during that period, then and in that case such lien so created shall have priority over the lien of such employee in the county where such corporation is located or doing business, and not otherwise.⁶⁹

Ameritrust arises in connection with the bankruptcy proceedings against The Domore Corp.⁷⁰ In this case, Ameritrust acquired an interest in Domore's personal property as security for a \$4,000,000 loan. Ameritrust perfected its interest by filing a UCC-1 financing statement with

66. 147 B.R. 473 (Bankr. N.D. Ind. 1992).

67. The corporate employee's lien is provided by statute set forth in IND. CODE §§ 32-8-24-1 through -6 (1992).

68. 1877 Ind. Acts, ch. 8, § 1.

69. IND. CODE § 32-8-24-2 (1992).

70. 147 B.R. 473 (Bankr. N.D. Ind. 1992).

the Indiana Secretary of State in 1988. In early 1991, at approximately the same time that Domore filed its bankruptcy petition, several employees of Domore filed notices of corporate employees' liens with the Elkhart County Recorder. A dispute quickly arose in the bankruptcy court as to whether Domore's corporate employees' liens took priority over Ameritrust's perfected security interest. The bankruptcy court found in favor of the employees and held that their liens had priority over Ameritrust's perfected security interest.⁷¹ Ameritrust appealed to the district court, arguing that the bankruptcy court misconstrued the phrase in the corporate employees' lien statute requiring prior security interests to be recorded in the county in which the corporation does business. Ameritrust argued that its filing with the Secretary of State made its lien a matter of record in the county, despite the fact that Ameritrust did not file its financing statement in the county recorder's office.⁷²

Ameritrust's argument has a great deal of merit. The corporate employees' lien statute was adopted at a time when there was no central filing with the Secretary of State for the perfection of security interest. At that time, all security interests had to be perfected by filing with county recorders. When the Indiana General Assembly adopted the UCC in 1963, it did not revise the exception to include security interests perfected by filing with the Secretary of State within the exception to the corporate employees' lien priority status.

Very few cases exist regarding the corporate employees' lien statute. One case, *Watson v. Strohl*,⁷³ did discuss the priority of the mechanics' lien over the corporate employees' lien. Both statutes provided that liens created under them would be prior to any other lien. The statutes made no reference to each other and therefore were in direct conflict with one another. In *Watson*, the court found the mechanics' lien law, which was enacted after the corporate employees' lien law, took precedence over the corporate employees' lien statute because the subsequent statute impliedly amended the prior statute.⁷⁴

In *Ameritrust*, however, there is no direct conflict between the corporate employees' lien statute and Article 9. The corporate employees' lien statute specifically provides that in order for a security interest to meet the exception to the priority of the corporate employees' lien, the security interest must be filed with the county recorder. Article 9, on the other hand, does not discuss the priority of the security interest perfected under its rules against security interests or liens given by some

71. *Id.* at 474.

72. *Id.* at 476.

73. 46 N.E.2d 204 (Ind. 1943).

74. *Id.* at 207.

other statute. Therefore, there is no conflict between these two statutes, and there is no occasion to find that one of the statutes impliedly amends the other.

For these reasons, the district court affirmed the decision of the bankruptcy court and held that the corporate employees' liens were entitled to priority over the perfected security interest of Ameritrust. That result is absurd under the policy and rationale of Article 9 of the UCC, and under present-day financing practices. But the courts are not in the position to rewrite the corporate employees' lien statute. This should be done by the Indiana General Assembly.⁷⁵

VI. UNIFORM COMMERCIAL CODE—SALES OR SERVICES

*Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*⁷⁶ highlights a conflict among the districts of the Indiana Court of Appeals regarding the application of the UCC to a "mixed" transaction involving both goods and services. This conflict arose when the Second District Court of Appeals decided *Baker v. Compton*.⁷⁷ The court in *Baker* refused to follow the approach of the Fourth District Court of Appeals in *Stephenson v. Frazier*.⁷⁸

The *Stephenson* case involved a contract in which the Stephensons agreed to purchase a modular home from Frazier. The contract included the installation of a septic system and construction of a foundation. Problems arose with both the construction of the foundation and the condition of the modular home, and the Stephensons desired to rescind the contract.⁷⁹ The fourth district found the modular home came within the definition of a "good" under the UCC,⁸⁰ and thus the sale was covered by the UCC. The court then held that

the part of the contract related to the construction of the foundation and installation of the septic system, however, does not

75. An attempt was made during the 1993 Indiana General Assembly to amend the corporate employees' lien statute. On January 5, 1993, Sen. Mrvan Worman introduced Senate Bill 136, which would have had the effect of subordinating corporate employees' liens to security interests filed with the county recorder's office. S.B. 136, 108th Gen. Assembly, 1st Reg. Sess. (1993).

The bill unanimously passed the Senate on February 16, 1993, and was sent to the House of Representatives. On April 5, 1993, the House approved an amended version of Senate Bill 136, but it completely excluded Sen. Worman's proposed changes to the employees' lien statute. As of publication time, no bills had been passed that amend the lien statute.

76. 594 N.E.2d 459 (Ind. Ct. App. 1992).

77. 455 N.E.2d 382 (Ind. Ct. App. 1983).

78. 399 N.E.2d 794 (Ind. Ct. App. 1980), *trans. denied*, 425 N.E.2d 73 (Ind. 1981).

79. *Stephenson*, 399 N.E.2d at 796.

80. IND. CODE § 26-1-2-105 (1992).

fall within the definition of "goods." These contractual provisions were for the performance of services and thus the issues pertaining to them must be determined by common law and contract principles.⁸¹

In so holding, the fourth district adopted the minority position that in mixed transactions the UCC applies to that portion of the contract involving the sale of goods, and general contract principles apply to that portion of the contract which relates to services.

The *Baker* case involved a contract in which Baker agreed to purchase a number of furnaces, air conditioners and water heaters from Compton to be installed by Compton in a building Baker was renovating. Before any of the equipment was installed, a dispute arose as to whether the proposed configuration of the equipment would properly regulate the temperature of the space. Baker refused to pay the initial installment of the purchase price due upon delivery of the equipment, and eventually sued for rescission of the contract.⁸² The second district in *Baker* recognized that the contract represented a "mixed" transaction involving both goods and services. This second district decision expressly declined to follow the *Stephenson* case. It held that

[t]he test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artists for painting) or as a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).⁸³

In so holding, the second district adopted the majority position, providing that the UCC applies to the entire contract if its "predominant thrust" is the sale of goods rather than the rendition of services.⁸⁴ If not, general contract law applies to the whole transaction. The *Baker* court felt that "the uniformity and clarity sought to be promoted by the UCC are better served by determining the predominant thrust of a mixed goods and services contract."⁸⁵

The fourth district used the case of *Data Processing Services, Inc. v. L.H. Smith Oil Corp.*⁸⁶ to express its view of the *Baker* decision. In this case, Data Processing Services (DPS) and L.H. Smith Oil Corp.

81. *Stephenson*, 399 N.E.2d at 797.

82. *Baker v. Compton*, 455 N.E.2d 382, 384-85 (Ind. Ct. App. 1983).

83. *Id.* at 386 (citing *Bonebreak v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974) (footnotes omitted)).

84. *Id.* at 387. See also *Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*, 594 N.E.2d 459, 463 (Ind. Ct. App. 1992), and authorities cited therein.

85. *Baker*, 455 N.E.2d at 387.

86. 492 N.E.2d 314 (Ind. Ct. App. 1986).

had entered into an agreement providing that DPS would develop a computer software program for Smith's accounting needs. The trial court held that the program to be developed by DPS was a "good" under the UCC. The fourth district disagreed and found that the program was not a "good" governed by the UCC and, therefore, no part of the contract would be governed by the provisions of the UCC.⁸⁷ The fourth district reiterated its "bifurcation" approach. The UCC applies to the goods portion of a contract and common law applies to the services portion of a contract. The court rather tersely rejected the "predominant thrust" approach by citing the legal maxim "*inclusio unius est exclusio alterius*."⁸⁸ Thus, as a matter of statutory construction, the fourth district holds that because the UCC applies to a sale of goods and only a sale of goods, it can never be applied to a portion of a contract which does not involve the sale of goods. Likewise, if part of a contract involves a sale of goods, the court must apply the UCC to that portion of the contract which relates to the sale of goods.

The third district of the court of appeals has joined the fray in *Insul-Mark Midwest*. In this case, Insul-Mark contracted with Modern Materials to have Modern Materials coat Insul-Mark's roofing screws with a supposedly rust-retardant coating. Modern Materials applied the coating to Insul-Mark's roofing screws and Insul-Mark began selling the coated screws. Unfortunately, the coating process did not work and the screws began to rust immediately. Insul-Mark sued Modern Materials seeking damages.⁸⁹ The third district had to decide whether the UCC applied to this contract in order to determine what warranties would be available to Insul-Mark. The court reviewed the different approaches adopted by *Stephenson* and *Baker* and decided the better view was set forth in *Baker*. The court determined the predominant thrust of the contract was providing a service, and not selling goods.⁹⁰

Although *Stephenson* has been criticized,⁹¹ it is not without merit. The bifurcation approach clearly attempts to construe the UCC strictly by limiting it to transactions specifically within its stated scope. If a "mixed" transaction can be easily separated into its goods component and its services component, then there should be little difficulty in applying the bifurcation approach.⁹²

87. *Id.* at 318.

88. *Id.*

89. *Insol-Mark Midwest, Inc. v. Modern Materials, Inc.*, 594 N.E.2d 459, 461-62 (Ind. Ct. App. 1992).

90. *Id.* at 463.

91. See, e.g., Gerald L. Bepko, *Contracts, Commercial Law, and Consumer Law*, 14 IND. L. REV. 223, 224 (1981).

92. One noted commentator has stated that when a case does not involve difficulties

The two approaches can be reconciled. In cases where the contract can easily be separated into goods and services components, the bifurcation approach should be used. For instance, the *Stephenson* case can easily be divided into the sale of the modular home and the installation of the foundation. If the dispute arose concerning the modular home (a sale of goods), then the UCC would be applied by the courts to resolve the dispute. On the other hand, if the dispute arose concerning the installation of the foundation (the provision of services), then the common law would be applied by the courts to resolve the dispute. In cases like *Insul-Mark*, however, it is impossible to separate the goods from the services. Because of this inability to segregate the component parts of the contract, the "predominant thrust" approach would apply. The courts should strive to construe statutes strictly. The bifurcation approach clearly attempts to do so. Only where a contract cannot easily be bifurcated, or where bifurcation presents difficult problems of proof or remedies, should the predominant thrust approach be used.

such as separating a contract into its goods component and its services component, or: insurmountable problems of proof in segregating assets and determining their respective values at the time of the original contract and at the time of resale, in order to apply two different measures of damages", [there is] no reason not to apply two bodies of law to the same transaction: the Article Two law to the sale of goods and the non-Article Two law to the rest.

1 WHITE & SOMMERS, *supra* note 64, at 26 (quoting *Hudson v. Town & Country True Value Hardware, Inc.*, 666 S.W.2d 51 (Tenn. 1984)).

Recent Developments in Corporation Law

ELIZABETH A. SMITH*

INTRODUCTION

Nineteen ninety-two was a relatively quiet year for corporation¹ law developments in Indiana. After several years of intensive legislative activity, the Indiana General Assembly and Indiana courts took the opportunity to make a few corrections to existing corporation statutes and to refine established common law doctrine. The purpose of this Article is to summarize those developments and to highlight certain changes anticipated as a result of renewed legislative activity in 1993, *i.e.* the introduction of legislation permitting the formation of limited liability companies.

This Article first addresses the limited statutory changes that occurred in 1992. It then discusses cases decided by the Indiana Court of Appeals and the Indiana Tax Court on such topics as piercing the corporate veil, shareholder relations in closely held corporations, nonprofit corporations, and interpretations of the Indiana Business Corporation Law (BCL).² Finally, this Article briefly notes the enactment of the Indiana Business Flexibility Act,³ which will permit the formation of limited liability companies in Indiana.

I. STATUTORY DEVELOPMENTS

After a series of significant legislative efforts resulting in the introduction, adoption, and amendment of the BCL and the Indiana Nonprofit Corporation Act of 1991 (1991 Act), there were few changes in cor-

* Partner, Ice Miller Donadio & Ryan. B.A., 1978 (*summa cum laude*), University of Illinois; J.D., 1985 (*magna cum laude*), University of Illinois. The author appreciates the assistance of Richard J. Thrapp in carefully reviewing and commenting upon a draft of this Article. The views expressed are solely those of the author.

1. This Article covers laws governing business corporations, including for-profit, not-for-profit, professional, and closely held varieties. It does not cover business trusts, boards of trade, exchanges, and chambers of commerce under IND. CODE § 23-5-1 (1992); public corporations and associations such as the Indiana Historical Society under § 23-6-2 or the Indiana Business Development Credit Corporation Law under § 23-6-4; fraternal organizations under § 23-10-2; or educational institutions such as Vincennes University under § 23-13-18, Wabash College under § 23-13-19, and the University of Evansville under § 23-13-20; or cemetery associations under § 23-14.

2. IND. CODE §§ 23-1-17-1 to -1-54-3 (1988 & Supp. 1992).

3. Pub. L. No. 8-1993, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE §§ 23-18-1-1 to -13-1).

poration statutory law in 1992. The Indiana General Assembly did not change the BCL, the Professional Corporations Act,⁴ or the laws governing takeover offers. The only amendments of the 1991 Act were in the nature of technical corrections principally intended to clarify or correct certain cross-references to other code provisions or to other sections of the 1991 Act, or to conform the language to typical statutory form.⁵

However, other amendments to the Indiana Code related to the 1991 Act merit a brief review. In adopting the 1991 Act, the Indiana General Assembly inadvertently approved blanket changes to certain statutes governing specialized corporations, such as those formed for the purpose of distributing water, those established as community development corporations or mutual housing associations, and those operated as public utilities,⁶ which brought into question their corporate status and authority to operate without reincorporating under the 1991 Act. The amendments adopted under Public Law 1-1992 in conjunction with specific amendments to the 1991 Act corrected that inadvertent and unintentional result.

II. CASE LAW

In 1992, Indiana courts considered relatively few cases raising issues about corporate governance and regulation. Of eleven cases involving corporation law considered by the Indiana Court of Appeals and the Tax Court of Indiana, four focused on the circumstances under which it was appropriate to "pierce the corporate veil," three dealt with governance of closely held corporations, one addressed corporate governance issues in the context of a nonprofit corporation, and three interpreted provisions of the BCL dealing with notice of meetings, the standard of conduct imposed upon directors, and agency law as it applies to corporate officers and employees. With one exception, these cases did not break any new ground, but merely acted to confirm existing common law and statutory principles. A synthesis of these cases is presented below.

A. *Piercing the Corporate Veil*

In four cases, the Indiana Court of Appeals and the Tax Court of Indiana explored and reconfirmed the parameters of separate corporate

4. IND. CODE § 23-1.5-1-1 to -14 (1988) (governing corporations formed by accounting professionals, architectural or engineering professionals, attorneys, health care professionals, and veterinarians).

5. Act of Feb. 12, 1992, Pub. L. 1-1992, §§ 118-128, 1992 Ind. Acts 1, 95-105 (codified as amended IND. CODE §§ 23-17-12-9, -17-2, -17-4, -17-5, -17-7 to -10, -18-1, -19-3, -20-2).

6. Act of Feb. 12, 1992, Pub. L. 1-1992, § 7, 1992 Ind. Acts 1, 5-6 (codified as amended IND. CODE § 4-4-12-1); § 12, 1992 Ind. Acts 1, 16 (codified as amended IND. CODE § 5-20-3-4); § 29, 1992 Ind. Acts 1, 30-32 (codified as amended IND. CODE § 8-1-2.2-2(h)).

existence. The context for these discussions was best addressed by the Tax Court in *SFN Shareholders Grantor Trust v. Indiana Department of State Revenue*,⁷ which began its analysis by stating that “[o]ne of the hallmarks of Anglo-American corporate law is the status of the corporation as a distinct entity, an artificial person separate from its shareholders, having the capacity to own property and to sue and be sued.”⁸ The Tax Court also noted that the doctrine of separate corporate existence cannot be defeated merely because a corporation also is a subsidiary, even a wholly owned subsidiary, of another corporation.⁹ In considering this issue in *Gurnik v. Lee*,¹⁰ the Indiana Court of Appeals for the Second District recited the fundamental proposition that Indiana courts, while reluctant to disregard corporate form, nevertheless “will do so to protect innocent third parties from fraud or injustice.”¹¹ The court noted, however, that the party seeking to pierce the corporate veil has the burden of proof and must show that the corporate form “was so ignored, controlled or manipulated that it was merely the instrumentality of another, and that the misuse of the corporate form would constitute a fraud or promote injustice.”¹² In *Detrick v. Midwest Pipe & Steel, Inc.*,¹³ the Indiana Court of Appeals for the Third District enunciated a similar statement of the law, adding that the corporate veil may be pierced where “innocent third parties have no way of knowing with which entity they are dealing.”¹⁴

In determining whether it is appropriate to pierce the corporate veil, the court must review carefully the entire relationship between the corporate entities and their respective directors, officers, and shareholders.¹⁵ In 1992, the courts considered a variety of factors in assessing these relationships, which are delineated below in the context of the cases in which they were decided.

In *Gurnik*, the Court of Appeals addressed a plaintiff’s request that

7. 603 N.E.2d 194 (Ind. Tax Ct. 1992).

8. *Id.* at 197-98.

9. *Id.* at 198.

10. 587 N.E.2d 706 (Ind. Ct. App. 1992).

11. *Id.* at 710 (citing *Stacey-Rand, Inc. v. J.J. Holman, Inc.*, 527 N.E.2d 726, 728 (Ind. Ct. App. 1988); *State v. McKinney*, 508 N.E.2d 1319, 1320 (Ind. Ct. App. 1987); *Extra Energy Coal Co. v. Diamond Energy & Resources, Inc.*, 467 N.E.2d 439, 441 (Ind. Ct. App. 1984)).

12. *Id.* (relying on federal opinions for burden allocation as indicated by citation to *Chicago Florsheim Shoe Store Co. v. Cluett, Peabody & Co.*, 826 F.2d 725, 728 (7th Cir. 1987); *Orloff v. Allman*, 819 F.2d 904, 908-09 (9th Cir. 1987); *United States v. Van Diviner*, 822 F.2d 960, 965 (10th Cir. 1987)).

13. 598 N.E.2d 1074 (Ind. Ct. App. 1992).

14. *Id.* at 1080.

15. *Id.*

the corporate form of The Travel Trade, Inc. be disregarded and that judgment on her claim for payment of unpaid wages be entered against its principal shareholder (M. Monroe Lee) or a corporation he controlled. Lee had agreed to provide working capital for Travel and did so through a series of loans between corporations he controlled and Travel. Plaintiff Jo Lynn Dickinson was the former president of Travel, who brought an action seeking payment of a bonus for the last year during which she was employed by Travel.¹⁶ The court first held that the trial court had erred in holding that Dickinson did not have a valid claim for unpaid wages, and then addressed the question of whether judgment on that claim could be entered against Lee or The Lee Corp., of which Lee was the sole shareholder.¹⁷

The court carefully identified several factors important in determining whether to pierce the corporate veil, but noted that no one factor alone is enough. Dickinson's primary argument in favor of piercing the corporate veil was that both Lee and The Lee Corp. loaned Travel substantial funds as working capital and that proceeds from the liquidation of Travel's assets were distributed to Lee and/or The Lee Corp. The court found this argument unpersuasive, concluding that the mere existence of a loan or series of loans between related corporations did not justify piercing the corporate veil.¹⁸

In its analysis, the court considered the following factors important: First, there was no evidence that Travel was used as the alter ego of its principal shareholder, Lee. Second, corporate formalities were consistently maintained in that each of the corporations held separate board meetings, kept regular records of those meetings, maintained separate bank accounts and accounting records, and filed separate tax returns. The loans between Travel and The Lee Corp. were properly and separately recorded in the accounting records of each corporation.¹⁹

In *Cap Gemini America, Inc. v. Judd*,²⁰ the Court of Appeals for the First District was faced with the question of whether evidence of the wealth of a parent corporation could be considered in assessing punitive damages against one of its subsidiaries. In this case, Cap Gemini America (a wholly owned subsidiary of Cap Gemini Sogeti) brought an action against Roy A. Judd, a former employee, for breach of covenants not to solicit employees, interference with contractual relationships, breach of fiduciary duty of loyalty, and unfair competition. Judd counterclaimed to recover unpaid wages, breach of resignation agreements, wrongful

16. *Gurnik*, 587 N.E.2d at 707.

17. *Id.* at 707-10.

18. *Id.* at 710-11.

19. *Id.*

20. 597 N.E.2d 1272 (Ind. Ct. App. 1992).

discharge, fraud, and other related claims.²¹ At trial, Judd attempted to fix the amount of punitive damages to which he claimed he was entitled by reference to the financial records and position of Cap Gemini Sogeti, the parent corporation. The court held that Judd failed to meet his burden of proof, noting that he had not argued that Cap Gemini America was a mere instrumentality of Cap Gemini Sogeti, and stating that “corporate form will not be disregarded solely because a corporation is the parent of another.”²² The court concluded that “[w]here no showing is made that the corporate veil should be pierced because the subsidiary was simply an alter ego or mere instrument of the parent, the wealth of the parent corporation cannot be considered for any purpose.”²³

Important to the trial court in *Detrick*, a wrongful death action, were the undisputed facts that Midwest Pipe & Steel, Inc. (a steel distributor who was shipping cargo through Midwest Trucking, Inc.) had no “interest” in Midwest Trucking, Inc., the employer of the individual who caused the accident leading to the wrongful death claim. “No identity” of shareholders, directors, or officers existed, and the corporations were formed at different times for different purposes. Each corporation had separate officers, separate telephone numbers, separate bank accounts, and separate books of account. Funds of the two corporations were not commingled.²⁴ The court of appeals concurred with the trial court’s basic analysis of the corporate veil issue, but concluded that upon retrial the plaintiff might be able to establish exceptional circumstances justifying piercing the corporate veil through resolution of certain factual disputes not resolved at the trial court level. The principal factual dispute centered on whether two individuals (one of whom owned Midwest Trucking and the other of whom owned Midwest Pipe) had “agreed that Midwest Trucking would be incorporated for the sole purpose of hauling Midwest Pipe product, would be identified as a ‘Midwest’ carrier to the motoring public, and identified as a ‘Midwest Pipe’ carrier to customers” and officials of the Department of Transportation.²⁵

In *SFN Shareholders Grantor Trust*, the Tax Court of Indiana held that the doctrine of separate corporate identity does not break down merely because one corporation is the subsidiary of another.²⁶ The court

21. *Id.* at 1277-78.

22. *Id.* at 1286.

23. *Id.*

24. *Derrick v. Midwest Pipe & Steel, Inc.*, 598 N.E.2d 1074, 1080 (Ind. Ct. App. 1992).

25. *Id.* at 1081.

26. *SFN Shareholders Granter Trust v. Indiana Dep’t of State Revenue*, 603 N.E.2d 194, 198 (Ind. Tax Ct. 1992).

refused to disregard corporate form, even though there was a close corporate relationship between the parent and subsidiary corporations in this case. The court held that ownership of the capital stock of a subsidiary did not amount to ownership of its assets and the court refused to permit the Indiana Department of State Revenue to assess gross income tax on the sale by the parent of the capital stock of its subsidiary. The court did note that the parent and subsidiary corporations had certain directors in common, but also noted they had different business locations.²⁷ In addition, they had different corporate purposes, the parent corporation was a holding company engaged primarily in holding all the shares of sixteen different corporations and the subsidiary was a publisher, principally of educational text books.²⁸

These four cases emphasize the need for careful pleading and proffer of evidence at trial: The party seeking to pierce the corporate veil must allege that the corporation was simply an alter ego or mere instrumentality of the shareholder (including any parent corporation). In addition, it is clear that a parent-subsidiary corporation relationship alone will not justify piercing the corporation veil, as one must be prepared to show an intermingling of purposes, operations, governance, accounting records, or financial arrangements.

These cases also remind practitioners who advise corporate clients of the importance of observing *all* corporate formalities and operating related corporations as if unrelated. Separate meetings of directors and officers should be held, separate accounting records should be maintained, separate banking arrangements should be established, and separate physical facilities and locations should be encouraged.

B. Closely Held Corporations

Three decisions rendered by the Indiana Court of Appeals in 1992 addressed the relationships among shareholders of closely held corporations as to corporate governance and the valuation of minority shareholder interests. In *Lowry v. Lowry*,²⁹ minority shareholders of a closely held corporation engaged in farming brought an action against the corporation's directors (their parents) alleging misuse of corporate funds, excessive compensation, waste of corporate assets, and mismanagement. Evidence at trial showed egregious conduct: The father and stepmother of the plaintiffs had falsified information on their personal tax returns, executed a mortgage on the corporation's property to assist the step-

27. *Id.* at 198-99.

28. *Id.* at 196.

29. 590 N.E.2d 612 (Ind. Ct. App. 1992).

mother's son purchase of a business, executed a mortgage to secure their own personal indebtedness, refused to provide corporate financial information when the minority shareholders so requested, amended the Articles of Incorporation without the minority shareholders' knowledge or approval, and received salaries far in excess of those set forth in the corporate minutes book.³⁰

In accordance with existing law, the court imposed upon the plaintiffs the burden of establishing unreasonable compensation, readily finding that burden satisfied.³¹ In addition, the court held that the defendants had "violated the fiduciary duty of directors and shareholders within a close corporation to operate fairly, honestly, and openly" by regarding and dealing with the assets of the corporation as if they were their personal assets.³² In support of this result, the court recited the facts that defendants took excessive salaries, falsified tax returns and articles of incorporation, and "drained the corporation's assets without regard to corporate liabilities thereby allowing the corporation to default on corporate obligations."³³

Further, because the defendants had breached their fiduciary duty to deal openly, honestly, and fairly with the minority shareholders, the court of appeals affirmed the trial court's holding that the defendants were not entitled to the statutory protection of Indiana Code section 23-1-35-1, which permits directors to avoid "personal liability if they act in good faith, 'with the care an ordinarily prudent person in a like position would exercise under similar circumstances,' and in a manner reasonably believed to be in the best interest of the corporation."³⁴ The court accurately stated the duty of care applicable to directors under section 23-1-35-1(a) of the BCL, but erred in further stating that a breach of this duty results in personal liability. Rather, section 23-1-35-1(e) imposes liability only if a breach of or failure to perform director's duties occurs *and* "[t]he breach or failure to perform constitutes willful misconduct or recklessness."³⁵ The court did not note this important distinction and thus did not address the question of whether the defendant's conduct rose to the level of willful misconduct or recklessness.

The court noted that the law presumes directors who breach their fiduciary duties to the corporation and minority shareholders engage in fraud. Accordingly, this presumption shifted the burden of proof to the defendants to show that their actions were honest and in good faith. The court readily concluded that the defendants failed to carry this

30. *Id.* at 615-16.

31. *Id.* at 621-22.

32. *Id.* at 620.

33. *Id.*

34. *Id.* at 622 (interpreting IND. CODE § 23-1-35-1(a) & (e)).

35. IND. CODE § 23-1-35-1(e) (1988).

burden of proof, holding that the conduct in which they had engaged amounted to fraud.³⁶

The two other cases involving closely held corporations focused on the valuation of minority shareholder interests in the context of the sale of their shares. In *Battershell v. Prestwick Sales, Inc.*,³⁷ the Court of Appeals for the First District considered a dispute among shareholders of a corporation involved in a residential development and golf course. Prior to the trial, the parties entered into a court-sanctioned Agreed Entry whereby the plaintiffs agreed to sell and the defendants agreed to buy all of the plaintiffs' interests in Prestwick Sales, Inc. The Agreed Entry provided that the trial court would hear evidence on the question of the price to be paid for the plaintiffs' interests. On appeal, the plaintiffs challenged the trial court's interpretation of the Agreed Entry, claiming that the trial court should have awarded them the fair market value of their stock.³⁸

The trial court had acknowledged that fair market value was the normal method of valuing equity interests in closely held corporations, but did not award plaintiffs that value. Instead, under the court's interpretation of the Agreed Entry, the parties had agreed to permit the trial court to consider "any and all issues" related to the determination of the price—including factors unrelated to fair market value. The factors that the trial court considered included the price that the plaintiffs paid for the stock, the personal risk the plaintiffs had undertaken in guarantying debt the corporation incurred, the length of time they had incurred that risk, and the plaintiffs' unwillingness to guaranty personally further loans to the corporation after December 1986. As a result, the trial court fixed the value of the stock at \$247,000, not the \$602,705.80 that the trial court had determined was the fair market value.³⁹

The court of appeals disagreed with the trial court's interpretation of the Agreed Entry, concluding that the agreement did not clearly communicate the intent to deviate from the fair market value. The court of appeals recognized that Indiana law does not require courts to value stock solely on the basis of fair market value, noting that "parties are free to stipulate to evaluation other than fair market value. . . . When the parties do not make such a stipulation, however, we find that fair market value is the appropriate method of valuing stock."⁴⁰ The court of appeals held that trial court erred when it considered factors irrelevant

36. *Lowry*, 590 N.E.2d at 623.

37. 585 N.E.2d 1 (Ind. Ct. App. 1992).

38. *Id.* at 2-3.

39. *Id.*

40. *Id.* at 5.

to fair market value. The court of appeals concluded that “[i]nstead of requiring parties to explicitly state that stock is to be valued solely on its fair market value, we find the better rule is to require parties who wish to deviate from that fair market value to express clearly that intent.”⁴¹

In the second valuation case, *Hardy v. South Bend Sash & Door Co.*,⁴² a shareholder in a closely held corporation sold his stock under the terms of a stock purchase agreement, and then brought an action against the purchasers for breach of that agreement. The agreement provided that prior to any transfer of the shares of the corporation, a shareholder must offer to sell his or her shares to the other shareholders for a purchase price to be determined periodically by mutual agreement of the shareholders. The initial purchase price was \$2,000 per share. The agreement also required that upon the termination of a shareholder’s tenure as an officer of the corporation, the shareholder was required to sell and the remaining shareholders of the corporation were required to buy all of the transferring shareholder’s interest in the corporation.⁴³

Several transfers of shares of the corporation occurred over the ten year period beginning with execution of the agreement and ending prior to initiation of the lawsuit. In December 1987, the plaintiff, an officer of the corporation, tendered a letter of resignation that the Board of Directors then accepted, to be effective on December 31, 1987. On April 11, 1988, meetings of the directors and shareholders of the corporation were held, at which they voted to increase the price per share payable under the agreement to \$3,000. Thereafter, in May 1988, the surviving officer-shareholders notified the plaintiff of their intent to purchase his stock at a purchase price of \$3,000 per share.

Following receipt of the notice, the plaintiff filed a lawsuit alleging breach of the agreement. Upon and in response to defendants’ motion for summary judgment, plaintiff sought to establish four issues of material fact in order to preclude a ruling in the defendants’ favor. The plaintiff alleged that the agreement did not clearly express an intent to deviate from market value as the method of valuation. He also alleged that stock sales made after December 1978 occurred without written notice to the other shareholders and that the defendants had misrepresented the corporation’s true financial condition to him. The court noted that Indiana law provides that parties to stock purchase agreements are “free to use methods of valuation other than ‘book value,’” adding

41. *Id.* at 6.

42. 603 N.E.2d 895 (Ind. Ct. App. 1992).

43. *Id.* at 897.

that it is for the shareholders to determine the method of valuation not the courts.⁴⁴

In analyzing the fiduciary duty issue, the court stated that the shareholders of a closely held corporation "stand in a fiduciary relationship and must deal openly, honestly, and fairly with one another and the corporation."⁴⁵ The court qualified this statement, however, by adding that the shareholder fiduciary duty rule "is limited when a director-shareholder buys or sells corporate stock for his own account."⁴⁶ The court expounded on this point, stating that "a corporate director who sells his personal shares or buys shares from other shareholders for his personal ownership owes no fiduciary duty to disclose information he possesses regarding the value of the stock to the other shareholders, provided that such a sale does not affect the general well-being of the corporation."⁴⁷ The court found that the facts indisputably showed that the sale of stock was between shareholders, not between the corporation and a shareholder. Therefore, the court concluded that the agreement controlled the valuation of the plaintiff's interests in the corporation, and that the purchasing shareholders did not have any duty to disclose financial information about the corporation to the plaintiff.⁴⁸ The Court of Appeals upheld the trial court's grant of summary judgment in favor of the defendants on the issues of breach of contract, fraud, constructive fraud, and conspiracy.⁴⁹

These cases reiterate two important and all too frequently ignored principles. First, majority shareholders of a closely held business cannot operate that business and deal with its assets as if it were their personal property. Conduct in which a sole proprietor may engage with impunity may be unacceptable in the context of a corporation. Second, agreements providing for the purchase and sale of interests in closely held corporations should be carefully and clearly drafted to express the parties' intentions with respect to valuation. If fair market value (or what the BCL refers to as "fair value"⁵⁰) is intended, the agreement should so state. If it is not, the factors to be analyzed in determining value (if a value is not provided in the agreement) should be clearly set forth in the agreement.

44. *Id.* at 899.

45. *Id.* at 900.

46. *Id.* (citing *Fleetwood Corp. v. Mirich*, 404 N.E.2d 38, 46 (Ind. Ct. App. 1980)).

47. *Id.*

48. *Id.*

49. *Id.* at 903.

50. IND. CODE § 23-1-44-3 (1988) (valuation for purposes of dissenters' rights).

C. Nonprofit Corporations

In 1992, the Indiana Court of Appeals considered a case focusing on corporate governance of nonprofit corporations organized under Indiana law. In *Brenner v. Powers*,⁵¹ the Court of Appeals for the Third District examined the membership rights of minority members of a nonprofit corporation organized under the 1935 General Not-For-Profit Corporation Act. This action was brought on behalf of several minority members of the Munster Medical Research Foundation, Inc. (MMRF) to challenge their exclusion from the voting membership of MMRF and the validity of the use of corporate funds for certain purposes.

Over the course of several decades the voting members of MMRF had amended its articles of incorporation by majority vote and these amendments had included changes in MMRF's membership provisions. In June 1985, the Board of Directors adopted another proposal for amending the Articles of Incorporation. That same day, they called a meeting of the members and adopted the amendments by a membership vote of 18 to 0. The plaintiffs alleged that they received no notice of this meeting and, therefore, were not able to exercise their right to vote.

The amendments approved at the meeting made significant changes in MMRF's membership provisions by eliminating all existing members and provided for one member, the Community Foundation, Inc., and such other members as the Foundation might select. The amendments also empowered the new members to make corporate decisions at annual or special meetings.⁵²

The court commenced its analysis of whether the plaintiffs' membership rights had been usurped by the June 1985 amendment by noting that "courts will not interfere with the internal affairs of a private organization unless a personal liberty or property right is jeopardized."⁵³ The court cited prior decisions of the court of appeals in stating that the articles of incorporation and bylaws of a nonprofit corporation are considered to be a form of contract between the corporation and its members, as well as among the members themselves.⁵⁴ The court rejected the plaintiffs' claim that they were lifetime members of MMRF, noting

51. 584 N.E.2d 569 (Ind. Ct. App. 1992). As the court pointed out in its first footnote in the case, the parties to the dispute relied upon the 1971 Not-For-Profit Corporation Act (1971 Act) for the authority for their arguments, but the record did not show that the corporation in question had accepted the 1971 Act, so the court followed the provisions of the 1935 Act for the purposes of rendering its decision. *Id.* at 571 n.1.

52. *Id.* at 572.

53. *Id.* at 574.

54. *Id.* (citing *Lozanoski v. Sarafin*, 485 N.E.2d 669, 671 (Ind. Ct. App. 1985)).

that a majority vote of the members had always been sufficient to change the membership provisions.

The court recited the general principle that the contractual relationship between a member of a nonprofit corporation and the corporation itself includes the applicable statutes under which the corporation is organized. In this case, the relevant statute provided that voting members of a nonprofit corporation were entitled to ten days advance notice of a meeting and that voting members had a right to vote on all matters affecting their membership status.⁵⁵ The court concluded that the plaintiffs were voting members at the time that the June 1985 amendment was adopted by the members of MMRF and were entitled to ten days advance notice, a right to attend, and a right to vote on the proposed amendments. Accordingly, the court held that the defendants breached their contract with the plaintiffs.

The court concluded that the former members had standing to bring a breach of contract claim based on a violation of their vested statutory rights and reversed the case for further proceedings on this issue. The court also concluded that the former members had standing to bring a declaratory judgment action to determine their individual membership rights, but they did not have standing to bring a quo warranto action.⁵⁶

D. *Indiana Business Corporation Law*

The Indiana Court of Appeals considered three cases interpreting various statutes and laws governing business corporations in 1992. In a case of first impression, the court of appeals considered whether a plan of merger was invalid because the corporation failed to give timely notice under the BCL of the shareholder meeting at which vote on the plan was taken. In another case, the court of appeals considered the standard of conduct applicable to directors of a grain elevator cooperative. Finally, the court of appeals had an opportunity to address issues of agency law in the context of corporate contractual obligations.

In *Hilligoss v. Associated Companies, Inc.*,⁵⁷ the court of appeals considered the plaintiff's complaint that the corporation failed to provide timely notice of a meeting of its shareholders called for the specific purpose of considering a plan of merger. On June 22, 1989, Associated Companies mailed to Hilligoss (by first-class postage prepaid United States mail) notice of a special meeting of the shareholders to be held on July 3, 1989 along with a proxy statement. Hilligoss, then a resident of France, received the notice on June 29, 1989, and on June 30, 1989,

55. *Id.* at 575.

56. *Id.* at 576.

57. 589 N.E.2d 1202 (Ind. Ct. App. 1992).

mailed his proxy statement dissenting from the plan of merger and sent a mailgram to the company indicating his dissent from the plan of merger.⁵⁸

On July 3, 1989, the company held the special meeting of its shareholders and the plan of merger was approved. Several hours later, the company received the mail-gram from Hilligoss indicating his dissent. The company refused to recognize Hilligoss as having perfected his dissent, and Hilligoss' equity holding in Associated Companies was converted into shares of the Acap Corporation, the parent company of Associated Companies. In his subsequent lawsuit, the plaintiff alleged that the stock he received was worth substantially less than his interest in Associated Companies prior to the merger.⁵⁹

The court looked to Indiana Code section 23-1-29-5(a), which provides that a corporation "shall notify shareholders of the date, time, and place of each annual and special shareholders' meeting no fewer than ten (10) nor more than sixty (60) days before the meeting date."⁶⁰ The court reviewed the record, concluding that notice of the shareholder meeting was effective on the date mailed, June 22, 1989.⁶¹ The plaintiff, relying on Indiana Trial Rule 6(A) and Indiana Code section 34-1-61-1,⁶² argued that the first day that should be considered in determining whether the statutory time frame was met was June 23, not June 22. Moreover, because the tenth day thereafter fell on a Sunday, and Sundays are excluded in this calculation, the "tenth" day for the purpose of the statute would be July 3, 1989.⁶³

Closely examining the language of the statute, the court concluded that "because the statute requires that *notice be provided* no fewer than ten (10) days before the meeting date, days should be counted 'backwards'

58. *Id.* at 1203.

59. *Id.*

60. IND. CODE § 23-1-29-5(a) (1988).

61. *Hilligoss*, 589 N.E.2d at 1204. The court also noted that the corporation is obligated to mail notice only to the last known address of the shareholder as shown in the corporation's current records. Evidently, however, the plaintiff did not raise as an issue the address to which his notice was mailed as the court does not mention this statutory provision after its one passing reference and the holding does not turn upon interpretation of that section. *Id.*

62. Indiana Trial Rule 6(A) provides that: "In computing any period of time prescribed or allowed . . . by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included unless it is: . . . (2) a Sunday In any event, the period runs until the end of the next day that is not a . . . Sunday" Indiana Code § 34-1-61-1 (1992) provides that: "The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded."

63. *Hilligross*, 589 N.E.2d at 1204-05.

from the date of the meeting to the date notice is effective and not 'forwards' from the date that notice is provided to the meeting date."⁶⁴ Under this test, the court found it obvious that notice was provided in a timely manner and affirmed the trial court's grant of summary judgment in favor of Associated Companies.⁶⁵

*Brane v. Roth*⁶⁶ presented the Court of Appeals for the First District with a shareholders' action against the directors of a rural grain elevator cooperative for losses the cooperative suffered due to the directors' failure to protect its financial position by hedging adequately in the grain market. The cooperative's financial records showed a steady pattern of losses, and after a particularly large loss in 1979, the directors of the cooperative authorized the manager to hedge its position in the market. Only a minimal amount was ever hedged in the following years, and in 1980 the cooperative's certified public accountant made substantial errors in the cooperative's 1980 financial statements, which when discovered in 1982 revealed that his report of a \$68,683 net profit was really a \$424,038 loss. The certified public accountant who reviewed and corrected the original financial statement opined at trial that the primary cause of the loss was the failure to hedge.⁶⁷

The trial court entered specific findings that the directors had breached their duties by retaining a manager inexperienced in hedging and by failing to supervise him properly. On appeal, the directors argued that the trial court had erred in applying the standard of care set forth in Indiana Code section 23-1-2-11,⁶⁸ which was repealed in 1986 and replaced with section 23-1-35-1(e).⁶⁹ The court refused to retroactively apply the standard of care established in Indiana Code 23-1-35-1(e), stating that "retroactive application is disfavored when existing rights would be infringed. . . . Because I.C. § 23-1-35-1 narrows director liability, the statute effects existing rights shareholders had against directors."⁷⁰

64. *Id.* at 1205 (emphasis added).

65. *Id.* at 1205.

66. 590 N.E.2d 587 (Ind. Ct. App. 1992).

67. *Id.* at 589.

68. Indiana Code § 23-1-2-11 (repealed 1986) "provided that a director shall perform his duties in good faith in the best interest of the corporation and with such care as an ordinarily prudent person in a like position would use in similar circumstances." *Brane*, 590 N.E.2d at 590. Furthermore, directors were permitted to rely upon information, reports, and opinions of the corporation's officers and employees to the extent that the directors believed them to be reliable and competent. *Id.*

69. Indiana Code § 23-1-35-1 "preserved the former standard of care but narrowed liability by adding that a director is not liable unless he has breached or failed to perform his duties and such breach or failure to perform constitutes willful misconduct or recklessness." *Brane*, 590 N.E.2d at 590.

70. *Brane*, 590 N.E.2d at 590.

In finding that the trial court applied the correct standard of care, the court of appeals also examined the business judgment rule as it applied to the directors' actions. The court noted that the business judgment rule protects directors from liability, but only if their decisions are informed ones.⁷¹ In an earlier case, the court held that a director could not act blindly and then avoid the consequences by claiming he or she was not aware of the effect of that action. The court in the earlier case further recited that directors have a duty to become informed about the actions that they undertake.⁷² In *Brane*, the court held that "the evidence shows that the directors made no meaningful attempt to be informed of the hedging activities and their effects upon [the cooperative's] financial position. Their failure to provide adequate supervision of the manager's actions was a breach of their duty of care to protect [the cooperative's] interests in a reasonable manner."⁷³

In a cross between agency law and corporation law, *Blairex Laboratories, Inc. v. Clobes*⁷⁴ provided the court of appeals for the First District with the opportunity to expound upon the doctrines of express and implied authority as they apply to a corporation's agents. Clobes, a pharmacist, developed a sterile saline solution for use in inhalation therapy and entered into a royalty agreement with Blairex Laboratories, Inc. to produce and market the product. The Board of Directors of Blairex held a special meeting in December 1986 at which it directed the president of Blairex to enter into a royalty agreement with Clobes, and through a series of offers and counter-offers, the president and Clobes agreed that Blairex would pay Clobes a royalty of 3.5% on this product and 5% on another product Clobes had suggested. Attorneys for Blairex prepared the written agreement, which was revised twice thereafter, and finally signed in May 1987. Blairex made regular royalty payments to Clobes even after he left their employ in April 1988. After the last quarter of 1988, no further royalty payments were made and Clobes sued Blairex. The trial court entered judgment in Clobes' favor and Blairex appealed.⁷⁵

The court reviewed existing Indiana common law on the doctrines of express and implied authority, noting that express authority may be derived from the charter or bylaws of the corporation, resolutions of its board of directors, and other written authorizations such as memoranda and letters. Implied authority binds a corporation only if the

71. *Id.* at 591-92.

72. *Id.* at 592 (citing *W & W Equip. Co. v. Mink*, 568 N.E.2d 564, 575 (Ind. Ct. App. 1991)).

73. *Id.*

74. 599 N.E.2d 233 (Ind. Ct. App. 1992).

75. *Id.* at 234-35.

act is appropriate in the ordinary course of the corporation's business, and may arise from a course of conduct whereby the corporation has repeatedly ratified acts of the same type.⁷⁶ The court carefully distinguished apparent authority from the forgoing, noting that apparent authority is created when a third person has reason to believe, as a result of some action on the part of the corporation, that the corporation has given the agent authority to act.⁷⁷

The court addressed the question of whether the president had authority to bind Blairex to the royalty agreement by first examining Indiana Code section 23-1-36-2 and then addressing Blairex's bylaws (which provided that the president was responsible for signing all of Blairex's contracts unless the Board of Directors stated otherwise) and actions of the board of directors. The BCL defines the powers and duties of corporate officers by providing that:

Each officer has the authority and shall perform the duties set forth in the bylaws or, to the extent consistent with the bylaws, the duties prescribed by the board of directors or by direction of an officer authorized by the board of directors to prescribe the duties of other officers.⁷⁸

As noted above, the court proceeded to find that the facts showed that both the bylaws of Blairex and a resolution of its board of directors in December 1986 authorized the president to bind Blairex to the royalty agreement. The trial court's finding that the royalty agreement was valid and enforceable was upheld.⁷⁹

These three cases touched on diverse, unconnected issues, but nevertheless are relevant to the daily practice of corporation law. Corporate law practitioners and corporation secretaries might find the Court of Appeals' guidance on counting days for purpose of notice requirements useful, while litigators—familiar with a different counting methodology—likely will find it perplexing. The decision in *Brane* reminds us that ignorance and lack of supervision will not avoid liability: directors have a duty to make informed decisions and to supervise management adequately. Nevertheless, it is important to note that this case was decided under the Indiana General Corporation Act, and the result under the BCL could be different because a breach of the duty of ordinary care is no longer sufficient alone to impose personal liability; the conduct now must also constitute willful misconduct or recklessness. Finally, it

76. *Id.* at 235-36.

77. *Id.* at 236.

78. IND. CODE § 23-1-36-2 (1988).

79. *Blairex*, 599 N.E.2d at 236-37.

is clear from the third decision that contractual obligations of a corporation authorized in advance by the board of directors and negotiated and signed by the president are binding and that agency law cannot be interposed to void the contract.

III. LIMITED LIABILITY COMPANIES

Legislation was introduced and enacted in the 1993 session of the Indiana General Assembly that will give Indiana businesses an innovative new option in forming a business organization commonly known as a limited liability company. The Indiana Business Flexibility Act,⁸⁰ signed into law on May 13, 1993, adds article 18 to Title 23 of the Indiana Code, thereby bringing Indiana in line with at least seventeen other states that have enacted similar legislation.⁸¹ In addition, at least ten states have proposed legislation permitting the formation of limited liability companies.⁸² Prior to the Act, Indiana recognized limited liability corporations formed in other states and required them to register with the Indiana Secretary of State before doing business in Indiana.⁸³

A limited liability company is hybrid: it is an unincorporated association with the characteristics of both corporations and partnerships. There are two principal advantages of a limited liability company over other forms of business organizations. First, the "members" of the company, much like corporate shareholders, are not personally liable for the acts or debts of the company, regardless of the extent of their involvement in the management of the corporation. Their maximum liability is limited to the amount of their investment in the company.⁸⁴

80. Pub. L. No. 8-1993, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE §§ 23-18-1-1 to -13-1).

81. See ARIZ. REV. STAT. ANN. §§ 29-601 to 29-857 (1992); DEL. CODE ANN. tit. 6, §§ 18-101 to 18-1107 (1992); FLA. STAT. ANN. §§ 608.401 to 608.471 (West 1982); Pub. Act 87-1062, 1992 Ill. Legis. Serv. 2283 (West) (effective 1-1-1994) (ILLINOIS SECRETARY OF STATE, *New law: Limited Liability Co. recognized*, BUS. BULL., Dec. 1992, at 4); IOWA CODE ANN. § 490A.100 (West 1992); KAN. STAT. ANN. §§ 17-7601 to 17-7651 (1990); LA. REV. STAT. ANN. §§ 9:3431 to 9:3433 (1992); MD. CODE ANN. CORPS. & ASS'NS, §§ 4A-101 to 4A-1103 (1992); MINN. STAT. ANN. §§ 322B.01 to 322B.88 (West 1992); NEV. REV. STAT. §§ 86.010 to 86.571 (1991); OKLA. STAT. ANN. tit. 18, §§ 2000 to 2060 (West 1992); R.I. GEN. LAWS §§ 7-16-1 to 7-16-75 (1992); TEX. REV. CIV. STAT. ANN. art. 1528n, §§ 1.01 to 9.02 (West 1992); UTAH CODE ANN. §§ 48-2b-101 to 48-2b-156 (1991); VA. CODE ANN. §§ 13.1-1000 to 13.1-1071 (Michie 1991); W. VA. CODE §§ 31-1A-1 to 31-1A-69 (1992); and WYO. STAT. §§ 17-15-101 to 17-15-136 (1977).

82. The states that have pending legislation include Connecticut, Hawaii, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, Pennsylvania, South Carolina, and Tennessee. MARTIN M. WEINSTEIN & JAMES J. DOHENY, *MERTENS LAW OF FEDERAL INCOME TAXATION* § 35.359.10 n.53.02 (Search of Westlaw electronic database, search of Library MERTENS using "CA(35.359.10)" on April 14, 1993).

83. IND. CODE § 23-16-10.1-1 (Supp. 1992).

84. See e.g., DEL. CODE ANN. tit. 6, §§ 18-303 & 18-703 (1992).

Second, a limited liability company is treated as a partnership (a "pass-through" entity) for federal income tax purposes, thereby avoiding the double taxation associated with C corporations. In determining the tax status of a limited liability company, one looks to four primary factors: (1) continuity of life, (2) centralization of management, (3) limited liability, and (4) free transferability of interests. If no more than two of the foregoing factors are present, the limited liability company generally will be taxed as a partnership.⁸⁵

As a practical matter, a limited liability company is most closely analogous to a "S" corporation without the attendant restrictions limiting the maximum number of shareholders to 35 and prohibiting subsidiaries and corporate shareholders. A limited liability company also may be viewed as a limited partnership that does not need a general partner with unlimited personal liability and does not restrict limited partner participation in management. Limited liability companies will be of interest not only to those forming a new business, but also to existing limited and general partnerships, S corporations, and certain C corporations.

Under the Act, a limited liability company will be formed by filing articles of organization with the Indiana Secretary of State.⁸⁶ The Act also provides that the shareholders will develop a written operating agreement regulating the affairs of the limited liability company, in many respects like corporate bylaws.⁸⁷

IV. CONCLUSION

Indiana practitioners should look forward to 1993 as a year of exciting developments in laws governing business organizations, including corporations. By contrast, 1992 was a year of consolidation and confirmation: Existing statutory and common-law rules were brushed off and brought forward to address primarily familiar issues and concerns without breaking new ground. Significant developments in Indiana corporation law will have to await another year.

85. WEINSTEIN & DOHENY, *supra* note 82, § 35.359.10 n.53.02 (citing Treas. Reg. § 301.7701-2(a)(1) (1992); *see also id.*, § 35.359.20.

86. Pub. L. No. 8-1993, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 23-18-1-4(a)).

87. *Id.* (adding IND. CODE §§ 23-18-4-4 to -6).

1992 Developments in Indiana Appellate Procedure: Of Timely Praecipes, Interlocutory Appeals, and Civility

GEORGE T. PATTON, JR.*

During 1992, the changes in Indiana appellate procedure largely came from opinions of the appellate courts. Amendments to the appellate rules during 1992 were mainly ministerial, adding no new major rules or procedures. The appellate courts' unpublished orders, like the published opinions, further provide insight into trends in Indiana appellate procedure.

In addition to being aware of the changes, lawyers and judges should contemplate how to further improve and refine Indiana's appellate procedures to increase quality and efficiency. In this spirit, this Article offers proposals to refine the state's appellate procedures. The limitations of appellate procedures generally come to light from the bench's and bar's day-to-day application of the rules to the case at hand. Many problems and answers that are difficult to discover in the abstract are easier to resolve and locate in the concrete.

The first section of this Article covers recent decisions on the timely initiation of an appeal by filing the praecipe. Section II discusses new opinions and rules on interlocutory appeals. Section III discusses recent Indiana Supreme Court opinions affecting appellate procedure. Section IV surveys the recent changes in the appellate rules. The final part of the Article reviews recent orders and opinions on civility between lawyers in the appellate context.

I. A TIMELY PRAECIPE TO INITIATE THE APPEAL

Although the appellate process has many jurisdictional hurdles—timely filing a record of proceedings, a motion to dismiss, a petition for extension of time, or a brief—the single most important appellate deadline is the timely filing of a praecipe to initiate the appeal. In all criminal appeals after January 1, 1993, the party initiating the appeal is required to serve a copy of the praecipe on the Attorney General,¹

* Associate, Bose, McKinney & Evans, Indianapolis. Adjunct Assistant Professor of Appellate Advocacy, Indiana University School of Law—Bloomington. A.B., 1984, Wabash College; J.D., 1987, Indiana University School of Law—Bloomington. I thank Ronald E. Elberger, Stephen E. Arthur, and Debra L. Burns of Bose McKinney & Evans, and Chief Justice Randall T. Shepard of the Indiana Supreme Court for reviewing a draft of this Article.

1. IND. APP. R. 2(A).

who is the representative of the state in all criminal appeals.² Although the procedures initiating a civil appeal did not change, a number of decisions during 1992 demonstrate potential problems of initiating an appeal when a motion to correct error is used.

A. *Timely Motions to Correct Error*

Since 1989, a motion to correct error is only required as a prerequisite to initiation of an appeal in two instances.³ First, a motion to correct error is a prerequisite for appeal when counsel seeks to introduce newly discovered material evidence that could not have been discovered or produced at trial.⁴ Second, a motion to correct error is a prerequisite for appeal to support a claim that a jury verdict is excessive or inadequate.⁵ When counsel chooses to file a motion to correct error, the motion must be timely or the appeal will be forfeited. Even if a praecipe is filed within thirty days of the trial court's ruling on the motion to correct, the appeal will be dismissed if the motion to correct error is not timely.⁶

In one appeal dismissed during 1992, the trial court entered an appealable final order with the language: "There is no just reason for delay and a Declaratory Judgment should be entered at this time."⁷ The time for filing either a motion to correct error or a praecipe began on the date the trial court entered its final order.⁸ The party against whom the judgment was rendered curiously moved the trial court to enter a final judgment almost a month later.⁹ The trial court granted the motion, and the party then filed a motion to correct error.¹⁰ Following a hearing on the motion to correct error, the trial court denied the motion.¹¹ The

2. IND. APP. R. 2(B).

3. See Karl L. Mulvaney, *Fundamental Changes in Indiana Appellate Procedure or, What Happened to the Motion to Correct Error?*, 32 RES GESTAE 472 (1989).

4. IND. TRIAL R. 59(A)(1).

5. IND. TRIAL R. 59(A)(2).

6. CNA Ins. Cos. v. Vellucci, 596 N.E.2d 926 (Ind. Ct. App. 1992).

7. *Id.* at 927; see IND. TRIAL R. 56(C):

[A] summary judgment upon less than all the issues involved in a claim or with respect to less than all the claims or parties shall be interlocutory unless the court in writing expressly determines that there is not just reason for delay and in writing expressly directs entry of judgment as to less than all the issues, claims or parties.

See also IND. TRIAL R. 54(B): "A judgment as to one or more but fewer than all of the claims or parties is final when the court in writing expressly directs entry of judgment, and an appeal may be taken upon this or other issues resolved by the judgment."

8. Vellucci, 596 N.E.2d at 928.

9. *Id.* at 927.

10. *Id.*

11. *Id.*

party finally filed its praecipe a month after the trial court denied the motion to correct error. The praecipe was untimely because the motion to correct error was untimely, resulting in dismissal of the appeal by the court of appeals.

When counsel is unsure whether a praecipe should be filed, a praecipe should be filed within thirty days of the questionable ruling even if a motion to correct error is used. In Indiana, the premature filing of a praecipe before the ruling on a motion to correct error constitutes sufficient compliance and is not a fatal defect.¹² In the federal system, however, the filing of a notice of appeal prior to a ruling on a timely motion under Federal Rule of Civil Procedure 50, 52(b), or 59 is void.¹³

Interestingly, the appellee moved to dismiss the appeal prior to briefing the case on the merits.¹⁴ The court of appeals initially denied the motion. After full briefing on the merits, the court of appeals reconsidered and held "that we do not have jurisdiction to entertain . . . [the] appeal."¹⁵ The law of the case doctrine did not prohibit the appellate court from reconsidering its ruling on a motion raised again in the same appeal.

B. Motions to Correct Error Deemed Denied

In addition to timely filing a motion to correct error, appellate practitioners should beware of the automatic denial of a motion to correct error by rule and the corresponding duty to file a praecipe within thirty days of the date the motion is deemed denied. The rule provides:

In the event a court fails for forty-five (45) days to set a Motion to Correct Error for hearing, or fails to rule on a Motion to Correct Error within thirty (30) days after it was heard or forty-five (45) days after it was filed, if no hearing is required, the pending Motion to Correct Error shall be deemed denied. Any appeal shall be initiated by filing the praecipe under Appellate Rule 2(A) within thirty (30) days after the Motion to Correct Error is deemed denied.¹⁶

12. *Haverstick v. Banat*, 331 N.E.2d 791 (Ind. Ct. App. 1975); see 4A KENNETH M. STROUD, INDIANA PRACTICE: APPELLATE PROCEDURE § 6.1, p. 9 (Supp. 1992) ("The premature filing of a praecipe is a procedural irregularity which does not adversely affect the substantial rights of any party or defeat appellate jurisdiction.").

13. FED. R. APP. P. 4(a)(4); but see 137 F.R.D. 417, 437-46 (1991) (The Advisory Committee on Appellate Rules has proposed a change to replace the current rule with one which states that an appeal filed before disposition of a motion to amend the judgment shall be held in abeyance and activate when the district judge acts on the motion.).

14. *Vellucci*, 596 N.E.2d at 927.

15. *Id.*

16. IND. TRIAL R. 53.3(A).

If a judge does not rule on the motion to correct error within the prescribed time limit, the motion is deemed denied by operation of law.¹⁷ This "lazy judge" rule is self-activating when the requisite number of days has lapsed.¹⁸

The self-activating portion of the rule can be a trap for the unwary appellate counsel. In *Jackson v. Paris*, a party timely filed a motion to correct error after the trial court entered judgment and a hearing commenced on May 17, 1991, and concluded on May 22, 1991.¹⁹ The trial court did not rule on the motion to correct error until August 27, 1991.²⁰ The party filed a praecipe on September 23, 1991.²¹

The court of appeals held that because "the praecipe was not timely filed in accordance with our rules of procedure, we lack jurisdiction and must dismiss the appeal."²² By operation of the rule, the motion to correct error was deemed denied thirty days after the hearing concluded. Because the party failed to file the praecipe within thirty days after the motion to correct error was deemed denied, the praecipe was not timely.

C. A Proposal: Initiating a Cross-Appeal

In Indiana, a praecipe serves two purposes. It informs the clerk of the trial court what is to be included in the record of proceeding that will be filed with the appellate court, and it serves as notice to all parties of record that an appeal has been commenced. Although the rules are clear regarding a single-party appeal, they are ambiguous when parties cross-appeal.²³

Indiana appellate rules should expressly address initiating cross-appeals. In the federal system if a timely notice of appeal is filed by a party, any other party may file a notice of appeal within fourteen days after the date on which the first notice of appeal was filed or within the time otherwise prescribed, whichever period last expires.²⁴ In Indiana,

17. *Jackson v. Paris*, 598 N.E.2d 1106, 1107 (Ind. Ct. App. 1992).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 1107-08.

23. The only reference in the rules refers to briefing requirements for cross-appeals: (D) BRIEFS IN CASES INVOLVING CROSS-APPEALS. If a cross-appeal is filed, the plaintiff in the court below shall be deemed the appellant for the purpose of this rule, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and argument involved in his appeal as well as the answer to the brief of appellant.

IND. APP. R. 8.3(D).

24. FED. R. APP. P. 4(a)(3).

once one party files a praecipe requesting the entire record of proceedings, the other party is not given additional time to consider a cross-appeal.

The Indiana Rules of Appellate Procedure also do not contemplate a reply brief for a cross-appellant, providing only for an appellant’s brief, an appellee’s brief, and a reply brief.²⁵ Four briefs, rather than the three, should be permitted in cross-appeals in the following order:

	<u>Color of Cover</u>	<u>Page Limitation</u>
Appellant’s Brief	Blue	50 pages
Appellee’s and Cross-Appellant’s Brief	Red	50 pages
Appellant’s Reply and Cross-Appellee’s Brief	Yellow	50 pages
Cross-Appellant’s Reply	Gray	25 pages ²⁶

Although this table suggests only twenty-five pages for the final reply brief, the current Indiana appellate rules permit up to fifty pages for reply briefs in all appeals, except appeals from the Indiana Tax Court.²⁷ Twenty-five pages of reply should be sufficient for almost all appeals. If the page limitation causes a hardship, a party could petition the appellate court for leave to file a brief in excess of the page limitation.²⁸

In cross-appeals, the second praecipe need only indicate to the trial court clerk the additional items that should be included in the record of proceedings. The second praecipe would counter-designate in addition to the initial designation of the first praecipe. Counter-designation would also be helpful to the appellee in defending a trial court’s judgment even in the absence of a cross-appeal. The appellee should have an opportunity to include pleadings and testimony in the record that supports the trial court’s judgment even if the praecipe does not call for such pleadings or testimony. The federal appellate systems permits such counter-designation.²⁹ Indiana should follow the federal approach with respect to initiating a cross-appeal, briefing in cross-appeals, and counter-designating portions of the record.

II. INTERLOCUTORY APPEALS

The most important change with respect to interlocutory appeals is a new deadline for permissive interlocutory appeals pursuant to Indiana

25. IND. APP. R. 8.3; *see also* IND. APP. R. 8.3(D) (“The brief of appellee shall contain the issues and argument involved in his [cross] appeal as well as the answer to the brief of appellant.”).

26. 7th Cir. R. 28(g)(1).

27. *Compare* IND. APP. R. 8.2(A)(4) *with* IND. APP. R. 18(E)(2).

28. IND. APP. R. 8.2(A)(4).

29. FED. R. APP. P. 10(b)(3).

Appellate Rule 4(B)(6). Effective January 1, 1993, a party wishing to pursue such an interlocutory appeal must petition the court of appeals to accept the interlocutory appeal within thirty days of the trial court's certification: "the petition for the Court of Appeals to entertain jurisdiction must be filed within thirty (30) days of *certification of the question* by the trial court"³⁰

Previously, the rules did not provide a time limit to petition the court of appeals for permission to take an interlocutory appeal after the trial court had certified the issue.³¹ During the last two years, the appellate procedures for permissive interlocutory appeals pursuant to Indiana Appellate Rule 4(B)(6) have been substantially clarified: (1) after a trial court certifies a question, the party has thirty days to petition the court of appeals to entertain jurisdiction, (2) the party must then file a praecipe no later than ten days *after* the court of appeals grants the petition and accepts the interlocutory appeal, and (3) the party shall file the record of proceedings no later than thirty days after the praecipe is filed.³²

A. Trial Court Certification of the Question

The use of the phrase "certification of the question" in the amendment to Indiana Appellate Rule 2(A) raises an interesting corollary issue regarding a petition to accept jurisdiction of an interlocutory appeal. During 1992, the court of appeals dismissed a petition to accept an interlocutory appeal because the trial court certified a question for interlocutory appeal.³³ The trial court had denied a motion to suppress evidence discovered as a result of a roadblock, but later certified for interlocutory appeal the denial of the motion to suppress with the following order:

Now certifies that the following issue shall be considered for interlocutory appeal:

Whether the roadblock at issue in the case at Bar complied with holding of *State v. Garcia* (1986) Ind., 500 N.E.2d 158.

The Court further finds that this Order involves a substantial question of law and the early determination of which will promote a more orderly disposition of this case.³⁴

30. IND. APP. R. 2(A) (emphasis added).

31. Bayless v. Bayless, 580 N.E.2d 962, 965 n.3 (Ind. Ct. App. 1991); George T. Patton, Jr., *Recent Developments in Indiana Appellate Procedure: Reforming the Procedural Path to the Indiana Supreme Court*, 25 IND. L. REV. 1105, 1108 (1992).

32. IND. APP. R. 2(A); IND. APP. R. 2(B).

33. Dingman v. State, 602 N.E.2d 184 (Ind. Ct. App. 1992).

34. *Id.* at 185.

The defendant petitioned the court of appeals to accept the interlocutory appeal pursuant to Indiana Appellate Rule 4(B)(6). The State opposed the petition.³⁵

By a two-to-one vote, the court of appeals denied the petition. The majority stated, "The rule makes no provision for the certification of questions to this Court by a state trial court."³⁶ In dissent, Judge Staton wrote that the majority had interpreted Indiana Appellate Rule 4(B)(6) too narrowly: "Regardless of the form—ruling on a motion to suppress or an order of the court—it is implicit that this Court has discretion to accept such appeals."³⁷ He further noted that as of July 2, 1991, a federal district court in Indiana could certify a question of law to the Indiana Supreme Court: "It appears highly unlikely that the shackles shorn from the federal trial courts would be left in place on the Indiana trial courts."³⁸

During 1992, the Indiana Supreme Court accepted and ruled upon the first certified question from a federal district court sitting in Indiana.³⁹ The Indiana Supreme Court's acceptance of the case generated numerous *amicus curiae*—Indiana State AFL-CIO, International Union, UAW, and the Indiana Trial Lawyers Association. In response to the certified question, the Indiana Supreme Court unanimously held that Indiana law will permit a cause of action by an injured employee against a worker's compensation insurance carrier for injuries proximately caused by the insurance carrier's tortious conduct such as gross negligence, intentional infliction of emotional distress, and constructive fraud.⁴⁰ The exclusive remedy provision of the Indiana Worker's Compensation Act did not preclude the action.⁴¹

B. Limits on Interlocutory Appeals of Right

In addition to prohibiting certified questions, the appellate courts limited interlocutory appeals as a matter of right under Indiana Appellate Rule 4(B)(1).⁴² The rule permits an interlocutory appeal as of right "[f]or the payment of money or to compel the execution of any instrument of writing, or the delivery or assignment of any securities, evidence of

35. *Id.*

36. *Id.*

37. *Id.* at 186 (Staton, J., dissenting).

38. *Dingman v. State*, 602 N.E.2d 184, 187 (Ind. Ct. App. 1992) (Staton, J., dissenting); *see also* IND. APP. R. 15(O).

39. *Stump v. Commercial Union*, 601 N.E.2d 327 (Ind. 1992).

40. *Id.* at 334.

41. *Id.* (citing IND. CODE § 22-3-2-6 (1988)).

42. *State v. Hogan*, 582 N.E.2d 824 (Ind. 1991); *Cua v. Morrison*, 600 N.E.2d 951 (Ind. Ct. App. 1992).

debt, documents or things in action”⁴³ The matters that are appealable as of right under the rule involve trial court orders which carry financial and legal consequences akin to those more typically found in final judgment: payment of money, issuance of a debt, and delivery of securities.⁴⁴

The Indiana Supreme Court held that Indiana Appellate Rule 4(B)(1) is not designed to create an appeal as of right from every order to produce documents during discovery.⁴⁵ To appeal a trial court’s order requiring the production of documents, a party must use the discretionary appeal procedures under Indiana Appellate Rule 4(B)(6). Thus, the party must obtain the trial court’s certification and have the court of appeals accept the interlocutory appeal. The interlocutory appeal is discretionary with the trial court and the appellate court.

A more difficult question arose before the court of appeals. A trial court had ordered a plaintiff to execute a medical release form and a letter authorizing plaintiff’s physicians to confer *ex parte* with defense counsel.⁴⁶ Following supreme court precedent, the court of appeals held, “[w]hile [plaintiff] does not have a *right* to appeal the trial court’s order compelling her to execute the release under A.R. 4(B)(1), she could have asked the trial court to certify the discovery order for an interlocutory appeal pursuant to A.R. 4(B)(6).”⁴⁷ In a concurrence, Judge Sullivan noted that the order involved in the appeal was for more than the production of information; rather, the order required the execution of a document that constituted a surrender of the patient-physician privilege.⁴⁸ He further stated that the surrender occurred in a setting that did not permit plaintiff’s counsel to be present.⁴⁹ Nonetheless, Judge Sullivan did not dissent to the dismissal of the appeal because the supreme court had entered an order dismissing an interlocutory appeal on the same facts. Judge Sullivan closed, “[W]e are bound by the Supreme Court’s order in *Lytle [v. Miller]* even though it may appear that the better course would be for the Court to modify the Appellate Rule.”⁵⁰

As an aside, the supreme court’s order in *Lytle v. Miller*⁵¹ arose from an unpublished opinion of the court of appeals. The majority

43. IND. APP. R. 4(B)(1).

44. *Hogan*, 582 N.E.2d at 825.

45. *Id.* (citing *Greyhound Lines, Inc. v. Vanover*, 311 N.E.2d 632 (Ind. Ct. App. 1974)).

46. *Cua*, 600 N.E.2d at 951.

47. *Id.* at 954.

48. *Id.* at 955 (Sullivan, J., concurring).

49. *Id.*

50. *Id.*

51. 583 N.E.2d 802 (Ind. Ct. App. 1991) (table).

opinion noted the supreme court's order in *Lytle*, but did not cite the court of appeals opinion because "memorandum decisions shall not . . . be regarded as precedent nor cited before any court" ⁵² Judge Sullivan argued that this prohibition did not relate to an unpublished decision or order from the supreme court or any court other than the court of appeals. ⁵³

C. A Proposal: Limit Interlocutory Appeals of Partial Summary Judgments

In Indiana, a summary judgment upon less than all the issues involved in a claim, or with respect to less than all the claims or parties, shall be interlocutory unless the court in writing expressly determines that there is no just reason for delay and in writing expressly directs entry of judgment as to less than all the issues, claims, or parties. ⁵⁴ In the federal system, a district court does not have such an option. ⁵⁵ Appeals of partial summary judgment relating to liability but not damages should not be appealable merely because a trial court finds no just reason for delay and in writing expressly directs the entry of judgment. Appeals of partial summary judgment should only be permitted as a permissive interlocutory appeal under Indiana Appellate Rule 4(B)(6), just as such appeals are permissive interlocutory appeals in the federal system. ⁵⁶

Although the Indiana Trial Rule 56(C) should be amended to delete appealability from partial summary judgments, Indiana Trial Rule 54(B) should be retained to allow a trial court to make final a judgment when there are multiple claims or multiple parties. If a trial court enters summary judgment finally disposing of the action as against one party in an action involving multiple parties, the trial court would still have the option to make that judgment final pursuant to Indiana Trial Rule 54(B). Alternatively, if a trial court enters summary judgment finally disposing of an entire claim in a multiple claim action, the trial court would still have the power to make the judgment final pursuant to Indiana Trial Rule 54(B). Deleting the similar provision from Indiana Trial Rule 56(C) would only affect cases in which the trial court has entered partial summary on liability but has not determined damages for the claim.

The general rule has long favored postponing appeal until final judgment has been rendered, because it promotes judicial economy by

52. *Id.* at 954 n.2 (quoting IND. APP. R. 15(A)(3)).

53. *Id.* at 954 n.3.

54. IND. TRIAL R. 56(C).

55. FED. R. CIV. P. 56(c).

56. 28 U.S.C. § 1292(b) (1988).

avoiding the time and expense attendant to piecemeal litigation.⁵⁷ A partial summary judgment on liability without a determination on damages is not "final," such as the entry of judgment in the favor of one party when multiple parties are involved or judgment on one entire claim when multiple claims are involved. One court of appeals decision implies that a trial court's findings under Indiana Trial Rule 56(C) without a certification under Indiana Appellate Rule 4(B)(6) could not be appealed:

The Court rendered summary judgment on less than all the issues in the complaint. Summary judgment on less than all the issues in a claim is interlocutory unless the court determines otherwise and certifies the judgment for appeal. Indiana Rules of Procedure, Trial Rule 56(C); Appellate Rule 4(B)(6). The trial court has done neither.⁵⁸

This reasoning is consistent with the federal rule for partial summary judgments: "[A] grant of partial summary judgment limited to the issue of . . . liability . . . [is] interlocutory . . . and where assessment of damages or awarding of other relief remains to be resolved have never been considered 'final' within the meaning of 28 U.S.C. § 1291."⁵⁹

III. THE INDIANA SUPREME COURT AND APPELLATE PROCEDURE

The Indiana Supreme Court further limited direct appeals to it by removing its exclusive jurisdiction over appeals from the denial of release in habeas corpus cases arising out of a criminal extradition or a mental health proceeding.⁶⁰ In 1992, the supreme court also handed down two particularly noteworthy decisions affecting Indiana appellate procedure. One decision was the highly publicized appeal brought by a former heavyweight boxing champion, and the other, although less publicized, considered "important questions about the authority of Indiana courts to permit pauper appeals in civil cases."⁶¹

A. *The Interesting Procedures in Mr. Tyson's Request for Bond Pending His Criminal Appeal*

In *Tyson v. State*,⁶² a jury found Michael Tyson guilty of rape and two counts of criminal deviate conduct.⁶³ The trial court sentenced Tyson

57. *INB Nat'l Bank v. 1st Source Bank*, 567 N.E.2d 1200, 1202 (Ind. Ct. App. 1991) (entry of partial summary judgment on liability with trial remaining on damages not appealable without certification under IND. APP. R. 4(B)(6) by both trial court and appellate court).

58. *Pekin Ins. Co. v. Charlie Rowe Chevrolet, Inc.*, 556 N.E.2d 1367, 1369 (Ind. Ct. App. 1990).

59. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976).

60. IND. APP. R. 4(A)(9) (deleted effective Jan. 1, 1993).

61. *Campbell v. Criterion Group*, 605 N.E.2d 150, 151 (Ind. 1992).

62. 593 N.E.2d 175 (Ind. 1992).

63. *Id.* at 176.

to an executed sentence of six years, and he sought bail from the trial court pending appeal.⁶⁴ The trial court denied bail, and Tyson petitioned the court of appeals for bail pending appeal.⁶⁵ After oral argument, the court of appeals denied the petition without offering a written opinion.⁶⁶

Mr. Tyson's lawyers then filed a petition in the supreme court in which they attempted to invoke the court's jurisdiction by alternative means: through a writ in aid of appellate jurisdiction or through transfer.⁶⁷ The supreme court first found that whether Mr. Tyson received bail pending his appeal did not involve the court's appellate jurisdiction over the merits of the appeal. Accordingly, a writ in aid of appellate jurisdiction was inappropriate.⁶⁸

The supreme court proceeded to discuss transfer. Writing for a unanimous court, Chief Justice Shepard stated: "Transfer as described in [Indiana Appellate] Rule 11 is simply an administrative term this Court has attached to the process of retaining control over this Court's declaration of law function."⁶⁹ Chief Justice Shepard pointed out that the court had previously recognized that a petition to transfer may be granted despite the fact that the appeal does not specifically fit within Indiana Appellate Rule 11:

[W]here the statute or rules of this Court fail to provide for a review of the decision of the Appellate Court, which decision could be reviewed under the old common law writ of certiorari, the Supreme Court of this state may consider a petition to transfer as a writ of certiorari at common law. In such a case this Court need not be limited to the items or grounds specified in the rule or in the statute. The action of this Court is based upon *its inherent constitutional duty to act as the final and ultimate authority in stating what the law in this state is*.⁷⁰

The court noted that although it had chosen to adopt rules of appellate procedure that generally limit actions that can be brought before the state's court of last resort, the court could still choose to speak on an issue for which the appellate rules do not specifically provide.⁷¹

The supreme court had chosen to assume jurisdiction in the case to write on the procedures for reviewing bail decisions pending appeal to

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 179-80.

69. *Id.* at 180 (footnote omitted).

70. *Id.* at 180 n.12 (quoting *Troue v. Marker*, 252 N.E.2d 800, 803 (Ind. 1969)) (emphasis in original).

71. *Id.* at 181.

give guidance to the lower courts. The supreme court, however, did not review the merits of the court of appeals' bail decision. The denial of the bond was not "so clearly in error that we should exercise our inherent authority to overrule it."⁷² The supreme court then returned the case to the court of appeals.

B. Pauper Appeals in Civil Cases

In *Campbell v. Criterion Group*,⁷³ the supreme court granted transfer to consider an important question about the authority of Indiana courts to permit pauper appeals in civil cases and the method by which such appeals may be brought.⁷⁴ The trial court had denied a motion to proceed on appeal as a poor person. The court of appeals subsequently granted the petition to proceed on appeal *in forma pauperis* and also held that an indigent civil appellant was entitled to a record of proceedings prepared without cost to the indigent.⁷⁵ On transfer, the supreme court considered two questions: (1) whether the trial court properly denied the motion to proceed on appeal as a poor person; and (2) if allowed to proceed *in forma pauperis*, whether the indigent is entitled to have the record of proceeding, or a portion thereof, prepared at public expense.

The supreme court agreed with the court of appeals that the trial court abused its discretion in denying the motion to proceed on appeal as a poor person, incorporating the court of appeals' "excellent history of the right to appeal and Indiana's accommodation of indigents."⁷⁶ The supreme court thoroughly analyzed the applicable statutes, the common law powers of court, and the constitutional and procedural authority to provide for indigent civil appeals.⁷⁷ The opinion contains a rich historical overview going back to Roman times, early acts of the British Parliament, and the beginning of the nation and state.

While the supreme court agreed with the court of appeals on reversing the trial court's denial of the motion to proceed on appeal as a poor person, the supreme court disagreed with the intermediate appellate court's decision that the indigent civil appellant is entitled to a record of proceedings prepared without cost to the indigent.⁷⁸ The supreme court stated:

72. *Id.* at 181.

73. 605 N.E.2d 150 (Ind. 1992).

74. *Id.* at 151.

75. *Campbell v. Criterion Group*, 588 N.E.2d 511 (Ind. Ct. App. 1992), *incorporated in part and vacated in part*, 605 N.E.2d 150 (Ind. 1992).

76. *Campbell*, 605 N.E.2d at 150.

77. *Id.* at 152-58.

78. *Id.* at 160.

We think our appellate rules afford a narrowly tailored solution. Appellate Rule 7.2(A)(3)(c) provides a mechanism for presenting a record to an appellate court in the event that “no report of all or part of the evidence or proceedings at the hearing or trial was or is being made, or if a transcript is unavailable.” In such cases, a party may prepare a statement of the evidence of proceedings from the best available means, including his recollection. The trial court has the duty to approve and settle such statements and once it has done so, it becomes a part of the record. . . . [T]his mechanism should also be made available to indigent appellants seeking to perfect their appeals.⁷⁹

The court added that agreed statements, as provided in Indiana Appellate Rule 7.3, may also be an acceptable alternative.⁸⁰ The supreme court determined that these alternatives strike the proper balance between the obligation to protect the procedural entitlements of indigent parties and the legitimate fiscal needs of the counties. The supreme court allowed the party to appeal *in forma pauperis*, but held that the party failed to demonstrate that the appeal could not have been perfected through the preparation of a statement of the evidence.⁸¹

C. A Proposal: Different Deadlines to Petition for Rehearing in Court of Appeals and to Transfer to Supreme Court

Beginning in 1988, a party no longer had to petition the court of appeals to rehear a cause in order to file a petition to transfer.⁸² Today, the time deadline for filing a petition for rehearing with the court of appeals and a petition for transfer to the supreme court is twenty days.⁸³ Although it was appropriate to have the same deadline when petitions for rehearing were mandatory, having the same deadline when petitions for rehearing are optional can deprive the court of appeals from considering a petition for rehearing on the merits.

For example, in a recent appeal both parties were dissatisfied with the opinion of the court of appeals and one party filed a petition for

79. *Id.* at 160 (citations omitted).

80. *Id.* at 160-61.

81. *Id.* at 161.

82. IND. APP. R. 11(B). The 1988 amendment provided:

Provided further, the party seeking transfer shall have the right at his option, without first filing a petition for rehearing in the Court of Appeals and having it denied, to petition the Supreme Court directly within twenty (20) days from the date of the rendition of the decision in the Court of Appeals to transfer the cause to the Supreme Court for review.

83. IND. APP. R. 11(B).

rehearing and another party filed a petition for transfer on the same day. In denying the petition for rehearing, the court of appeals determined that "effective at the time of the filing of [the] Petition to Transfer, this court became divested of jurisdiction and therefore, lacks the authority to address the merits of appellants' Petition for Rehearing."⁸⁴ The court of appeals did allow the party twenty days to petition the supreme court for relief. The appellant subsequently filed a petition to transfer, arguing that the court of appeals' denial of rehearing on jurisdictional grounds was erroneous.⁸⁵ Specifically, the appellant maintained that the ruling contradicted the internal process the supreme court had previously employed.

Rather than having the same time frame, the better approach would be to have a longer time period to petition for transfer than to petition for rehearing and toll the time for filing a petition to transfer while the court of appeals considers the matter on rehearing. In the federal system, the time for filing a petition for writ of certiorari to the United States Supreme Court is tolled if a timely petition for rehearing has been filed.⁸⁶ The time deadline should be lengthened for filing a petition to transfer and shortened for a petition for rehearing. The supreme court should not be reviewing the decision of the court of appeals until it is final, rehearing and all.

IV. MINISTERIAL DEVELOPMENTS IN INDIANA APPELLATE RULES

Although there were few changes in the Indiana Rules of Appellate Procedures, the ones that were made make the appellate process more convenient for the practitioner. Any party during the pendency of an appeal may request that service of orders and opinions in a case be made by electronic facsimile transmission.⁸⁷ The filing fees set forth by statute were incorporated into the appellate rules.⁸⁸ Marginal notes are no longer required on the clerk's portion of the record of proceedings.⁸⁹

84. *Indiana Carpenters Cent. & Western Ind. Pension Fund v. Seaboard Sur. Co.*, No. 49A02-9111-CV-510 (Ind. Ct. App. March 9, 1993).

85. Appellant's Brief in Support of Petition to Transfer, *Carpenters Cent. & Western Ind. Pension Fund v. Seaboard Sur. Co.*, (No. 49 A02-9111-CV-510) (Ind. March 29, 1993).

86. United States Supreme Court Rule 13.4 provides:

[I]f a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment.

87. IND. APP. R. 12(F).

88. IND. APP. R. 3(A); IND. ORIGINAL ACTION R. 3(J).

89. IND. APP. R. 7.2(A)(2).

A. Service Via Facsimile Transmission

An entire new subsection was added to the appellate rules on filing and service. The new subsection became effective on April 27, 1992 and reads:

(F) **OPTIONAL SERVICE BY CLERK.** Any party during the pendency of an appeal may request that service of orders and opinions in that case be made by Electronic Facsimile Transmission (FAX). The request must be written, signed by the attorney or party making the request, and provide the telephone number at which such service shall be made. In those instances where service is made by FAX, the Clerk will retain as a record of service the machine generated transmission log. When service is made by FAX, duplicate service will not be made. The Clerk of the Court, without notice, may decline or discontinue FAX service in the event electronic transmission is not possible.⁹⁰

This new service should help lawyers by providing quicker notice of court action. Because a petition for rehearing and a petition for transfer is due twenty days from "rendition of the decision," this will provide the practitioner the full period to respond.⁹¹

B. Filing Fees in Rule

The filing fee in the appellate court is set at \$250 by statute.⁹² The appellate rules were amended to track the statutory fee, thus alleviating counsel's need to dig into the statute to discover the filing fee:

Upon the filing of the record of proceeding, the appellant shall pay a filing fee of two hundred fifty (\$250) dollars. The fee is not applicable in cases prosecuted as a pauper cause or on behalf of a governmental unit.⁹³

In promulgating this amendment, the supreme court noted that the amendment did not concern a new filing fee because the \$250 filing fee had been in effect for several years.

C. Marginal Notes in Transcript

Marginal notes are no longer required on the Clerk's portion of the record of proceedings.⁹⁴ Marginal notes still are required on the transcript of evidence. The rule provides:

90. IND. APP. R. 12(F).

91. IND. APP. R. 11(A), (B).

92. IND. CODE § 33-15-5-2 (1988).

93. IND. APP. R. 3(A).

94. IND. APP. R. 7.2(A)(2) ("Notations need not be made in the margins on the pages of the Clerk's portion of the record.").

Notations shall be made on the margin of each page of the transcript of the evidence indicating all motions and the ruling thereon; the exhibits, if any; the instructions given and refused; all rulings of the court; and where the evidence is set out by deposition or otherwise, the name of each witness, and whether the examination is direct, cross, or redirect.⁹⁵

During 1992, the court of appeals summarily affirmed an appeal when an appellant failed to comply with the rule of appellate procedure mandating marginal notations on the transcript.⁹⁶

The appellee in the case first moved to dismiss the appeal for failing to include marginal notations. The court of appeals denied the motion but ordered the appellant to make appropriate marginal notations as required by the rule within fifteen days. Even after this grace period, the court of appeals found that preparation of the record fell demonstrably short of compliance with the appellate rules and the court's order:

The record in the instant case consists of three volumes containing 483 pages. Following our . . . Order, there remain in the record well in excess of 150 instances in which [the appellant] failed to comply with our Order and the appellate rules relative to the identification of the witness being examined. In addition, [the appellant] also failed in 36 instances to comply with the Order, and App. R. 7.2(A)(3)(a), relative to identification and admission of exhibits.⁹⁷

The court of appeals noted that the marginal notations were enacted for the purpose of aiding the appellate court in the expeditious and efficient consideration of appeals. Marginal notes were "indispensable aids" in the process of searching the record.⁹⁸

D. A Proposal: Require Court Reporter to Put Marginal Notations on Transcript

In some counties, the court reporters will put marginal notations on the transcript of evidence.⁹⁹ The appellate rules should place the duty not on counsel to put marginal notations on the transcripts, but rather

95. IND. APP. R. 7.2(A)(3)(a).

96. *Summers v. Summers*, 591 N.E.2d 152 (Ind. Ct. App. 1992).

97. *Id.* at 153.

98. *Id.* at 154 (quoting *Hickey v. Hickey's Estate*, 136 N.E.2d 722, 724 (Ind. Ct. App. 1956)).

99. For example, in St. Joseph county the court reporters put marginal notations on the transcript while they are transcribing the evidence.

on court reporters while they are transcribing the evidence. Such additional typing will not be much of an added burden and will greatly facilitate preparation of the record of proceedings for filing with the appellate court clerk.

V. CIVILITY ON APPEAL

Within the last five months of 1992, the supreme court has stricken two briefs. The Indiana Supreme Court's first order, entered *sua sponte*, speaks for itself:

The Petition filed by counsel . . . contains disrespectful, scandalous, and impertinent allegations aimed at the Indiana Court of Appeals. Such pleadings are subject to being stricken from the record. *Barnard v. Kruzan* (1942), 221 Ind. 208, 46 N.E.2d 238.

Accordingly, the Court now strikes the Petition to Transfer from the record of this case. The Court will consider a Petition to Transfer on behalf of appellant . . . if a proper petition is filed on or before August 21, 1992.¹⁰⁰

The supreme court allowed fifteen days to file a proper petition. In the second order, the Indiana Supreme Court acted in response to a motion to strike and this time did not give a second chance:

The Court, being duly advised, finds that the Appellant's Brief in Opposition to Petition to Transfer contains unwarranted personal attacks upon the integrity of counsel for the Appellee, and that it unfairly and improperly characterizes the arguments of the Appellee as attempts to deceive the Court. Accordingly, the Appellant's Brief in Opposition to Petition to Transfer is ordered stricken.¹⁰¹

Disrespectful, scandalous and impertinent attacks on the court of appeals, personal *ad hominem* attacks on the integrity of counsel, and unfair characterization of opposing arguments in an attempt to deceive a court have no place in the Indiana appellate system.

The most pointed lecture on civility came from the court of appeals. That court's own words provide a persuasive discussion of the effectiveness of such arguments:

We must first discuss the quality of briefing by counsel in this appeal. Throughout the parties' briefs, they have launched

100. *Deitsch v. Linderman*, No. 49A02-9105-CV-219 (Ind. Aug. 6, 1992).

101. *Cap Gemini Am., Inc. v. Judd*, No. 29A02-9010-CV-620 (Ind. December 29, 1992).

rhetorical broadsides at each other which have nothing to do with the issues in this appeal. Counsels' comments concern their opposite numbers' intellectual skills, motivations, and supposed violations of the rules of common courtesy. Because similar irrelevant discourse is appearing with ever-increasing frequency in appellate briefs, we find it necessary to discuss the easily-answered question of whether haranguing condemnations of opposing counsel for supposed slights and off-record conduct unrelated to the issues at hand is appropriate fare for appellate briefs.

At the outset, we point to the obvious: the judiciary, in fact and of necessity, has absolutely no interest in internecine battles over social etiquette or the unprofessional personality clashes which frequently occur among opposing counsel these days. Irrelevant commentary thereon during the course of judicial proceedings does nothing but waste valuable judicial time. On appeal, it generates a voluminous number of useless briefing pages which have nothing to do with the issues presented, as in this appeal.

Further, appellate counsel should realize, such petulant grouching has a deleterious effect on the appropriate commentary in such a brief. Material of this nature is akin to static in a radio broadcast. It tends to blot out legitimate argument.

On a darker note, if such commentary in appellate briefs is actually directed to opposing counsel for the purpose of sticking hyperbolic barbs into his or her opposing numbers' psyche, the offending practitioner is clearly violating the intent and purpose of the appellate rules. In sum, we condemn the practice, and firmly request the elimination of such surplusage from future appellate briefs.¹⁰²

The appellate court should continue to upbraid counsel for uncivil conduct toward a court, opposing counsel or an opposing party. The purpose of the appellate process is to resolve disputes, not create personal disputes through the resolution of the issues. This Article will end with a proposal on civility: be respectful of the courts and counsel.

102. *Amax Coal Co. v. Adams*, 597 N.E.2d 350, 352 (Ind. Ct. App. 1992).

1992 Federal Practice and Procedure Update for Seventh Circuit Practitioners

JOHN R. MALEY*

INTRODUCTION

Indiana practitioners litigating in federal court encountered diverse developments in federal practice during 1992. At the local level, the courts implemented Civil Justice Reform Plans, the Southern District enacted revised local rules, and numerous decisions were rendered on an array of procedural topics. In the Seventh Circuit, several questions of first impression were decided. At all levels, the federal courts continued their struggle to administer increasing caseloads. This Article, as the fifth of an annual section on federal civil practice, highlights the more important developments in an effort to assist local attorneys in their federal civil litigation.

The subjects are presented in the order in which they often arise in litigation. For ease of future reference, the following table of contents outlines the subjects discussed:

<u>Topic</u>	<u>Page</u>
Subject Matter Jurisdiction	817
Personal Jurisdiction	831
Service of Process	831
Specificity of Pleading	834
Filing — Rule 5	836
Amendments — Rule 15	837
Preliminary Injunction Standards	838
Discovery	841
Summary Judgment	843
Trial	845
Miscellaneous	849

I. SUBJECT MATTER JURISDICTION

A. *Diversity Jurisdiction*

Several recent decisions stress the importance of the rule for determining citizenship of partnerships for diversity jurisdiction. Recall that

* Associate, Barnes & Thornburg, Indianapolis; Adjunct Professor, Indiana University School of Law—Indianapolis; Lecturer, Indiana Bar Review. B.A., 1985, University of Notre Dame; J.D. (summa cum laude), 1988, Indiana University School of Law—Indianapolis.

in *Carden v. Arkoma Associates*,¹ the United States Supreme Court held that in determining the citizenship of a limited partnership for diversity purposes, the residence of *all* partners—including limited partners—must be considered.² This rule followed from the settled maxim that in suits involving noncorporate entities, the citizenship of all members must be considered for diversity.³

In *Kubale v. DeSoto, Inc.*,⁴ this rule was applied in a case brought by a partner of a law firm for recovery of legal fees for services provided to a client. The law firm, with partners in Illinois and Wisconsin, had a claim for more than \$50,000 in fees against the client. Because Wisconsin statutes allow a partner asserting a partnership claim to sue in the partner's own name without joining the other partners, one of the partners sued in a Wisconsin state court on behalf of the partnership. The client, an Illinois corporation, removed the action on the basis of diversity, pointing out that the suing partner was a Wisconsin citizen.⁵

The suing partner moved to remand, arguing that diversity was lacking because the other partners' domiciles must be considered, and several of those partners were Illinois citizens, just like the defendant. The court agreed and remanded the action, reasoning that all partners must be considered for diversity.⁶ The court also relied on *Northern Trust Co. v. Bunge Corp.*,⁷ for the proposition that "'federal courts must look to the individuals being represented rather than their collective representative to determine whether diversity exists.'" ⁸ Thus, even though a state statute allowed the partnership claim to be pursued by one representative partner, federal jurisdiction still requires complete diversity, considering the citizenship of all represented partners. As the court explained, under a contrary rule, "a partnership . . . could create or destroy federal jurisdiction by craftily choosing its partnership representative."⁹

1. 494 U.S. 185 (1990).

2. *Id.* at 195.

3. *Id.*

4. 777 F. Supp. 1452 (E.D. Wis. 1991).

5. *Id.* at 1452-53.

6. *Id.* at 1454-55.

7. 899 F.2d 591 (7th Cir. 1990).

8. *Kubale*, 777 F. Supp. at 1453 (quoting *Northern Trust*, 899 F.2d at 594).

9. *Id.* at 1454. Judge Noland showed similar respect for these rules in *Numismatic Enters. v. Hyatt Corp.*, 797 F. Supp. 687, 690 (S.D. Ind. 1992), in which a rare-coins partnership sued Hyatt for alleged negligence in storing valuables in a safety deposit box. The partnership sued in state court, and Hyatt removed to federal court claiming diversity. Although diversity appeared present because neither of the two partners shared the same domicile as Hyatt, Judge Noland nonetheless examined whether a third individual who received a percentage of the partnership profits might be considered a "partner." If so,

B. Amount-in-Controversy Requirement

A number of decisions addressed the diversity jurisdiction amount-in-controversy requirement that the matter exceed the sum or value of \$50,000.¹⁰ In *Bradford National Life Insurance v. Union State Bank*,¹¹ the plaintiff sued a bank in federal court for alleged conversion of a check in the amount of \$50,000. The case, filed in 1990, proceeded all the way to a trial setting in June of 1992, when, four days before trial, the parties notified the court that the case could be decided on stipulated facts.¹² Before doing so, however, the court raised the issue of subject matter jurisdiction *sua sponte*, and held that the amount-in-controversy requirement was not satisfied.¹³ Under § 1332(a), the amount in controversy must *exceed* \$50,000, exclusive of interest and costs. In this case, however, the check at issue was for exactly \$50,000, and thus could not confer federal jurisdiction.

The court further reasoned that the plaintiff's claim for "interest at the legal rate" did not add to the amount in controversy.¹⁴ Section 1332(a) excludes interest that becomes due because of a delay in payment, and although prejudgment interest *is* to be considered in the amount in controversy, the court observed that the governing state statute did not allow prejudgment interest in this setting.¹⁵ Further, although attorneys' fees may be considered in determining the jurisdictional amount, and such fees were specifically requested in the complaint, the request was to no avail because the plaintiff failed to show any legal right to recover such fees.¹⁶

Several cases address the situation in which a plaintiff brings a tort claim in a state court, the case is removed to federal court, but because of a state-law prohibition against a prayer for a specific dollar amount, the complaint is silent as to the amount of damages sought. Each state

diversity would have been destroyed.

Judge Noland found this individual not to be a partner, because he did not own any of the partnership, did not share in losses, and was not involved in partnership decision-making. *Id.* at 690-91. Thus, although diversity remained, the case shows that courts will follow the Seventh Circuit's directives to police the limits of federal jurisdiction. *See id.* at 690 n.2 (quoting *Market St. Assocs. v. Frey*, 941 F.2d 588, 590 (7th Cir. 1991)). In cases involving partnerships, practitioners must take extra care to determine whether diversity is present.

10. 28 U.S.C. § 1332(a) (1988).

11. 794 F. Supp. 296 (E.D. Wis. 1992).

12. *Id.* at 297.

13. *Id.* at 298.

14. *Id.*

15. *Id.*

16. *Id.*

in the Seventh Circuit has such a limitation.¹⁷ In such cases, at least some courts take the position that they have an independent duty to determine the amount in controversy.¹⁸

In the Northern District of Illinois, courts have set a new trend for dealing with such cases. One line of authority simply holds that when the prayer does not specifically seek more than \$50,000, and when the injuries sustained are not clear from the complaint, a prompt remand is the prudent course.¹⁹

Thus, in *Navarro v. Subaru of America*,²⁰ Judge Norgle—on the court's own motion—considered whether jurisdiction was present in a personal-injury action after Subaru's notice of removal. Notwithstanding the plaintiff's allegations of permanent physical injuries, lost wages, medical expenses, and pain and suffering, the court simply remanded the action.²¹ The court specifically refused to consider Subaru's claim that plaintiff suffered a fractured pelvis, ribs, ankles, and other bones because this was not alleged in the complaint, but was instead "merely derived from an apparent informal conversation [between counsel]."²² The court further stated that it was "concerned with needlessly divesting the state courts of jurisdiction over matters legitimately in their domain."²³ Judge Norgle then noted that if discovery later showed that the amount in controversy did exceed \$50,000, the thirty-day removal period would start again.²⁴ In remanding the companion case, *Stemmons v. Toyota Tsusho America*,²⁵ Judge Norgle appeared to add an additional requirement for removal, stating that if it should later appear through further proceedings in state court "that the requisite amount is *clearly* in excess of \$50,000, the thirty-day period for seeking removal would begin anew."²⁶

It is unclear how federal judges in Indiana will handle such issues. No reported decisions on point from Indiana's federal courts have been

17. ILL. REV. STAT. ch. 110, para. 2-604 (1992); WIS. STAT. ANN. § 802.02(1m)(a) (Supp. 1992); IND. TRIAL R. 8(A)(2).

18. *Krider Pharmacy v. Medi-Care Data Sys.*, 791 F. Supp. 221, 225 (E.D. Wis. 1992).

19. *Navarro v. Subaru of Am.*, 802 F. Supp. 191, 193 (N.D. Ill. 1992).

20. *Id.*

21. Judge Norgle's "automatic remand" decision follows a similar holding of Judge Shadur in 1990. *See Navarro v. LTV Steel Co.*, 750 F. Supp. 930, 931 (N.D. Ill. 1990). A companion decision issued by Judge Norgle on the same day as the *Subaru* decision contains strikingly similar facts, and the same analysis and remand as in *Subaru*. *See Stemmons v. Toyota Tsusho Am., Inc.*, 802 F. Supp. 195, 198-99 (N.D. Ill. 1992).

22. 802 F. Supp. at 194.

23. *Id.*

24. *Id.*

25. 802 F. Supp. 195 (N.D. Ill. 1992).

26. *Id.* at 198 (emphasis added) (citation omitted).

located, and—probably because remand orders are generally not appealable²⁷—clear guidance from the Seventh Circuit is absent. Although *Subaru* and *Toyota* certainly follow the Seventh Circuit directives to police jurisdiction, it is respectfully submitted that the approach in these cases goes too far and should not be followed by federal judges in Indiana.

There are four potential difficulties with the *Subaru* reasoning. First, the question is not whether a plaintiff *will* recover more than \$50,000, but whether it can be said to a legal certainty that a plaintiff *cannot* recover such an award.²⁸ The *Subaru* rationale imposes a contrary requirement. Indeed, in the portion of the *Toyota* opinion stating that removal could be possible if new facts are discovered, Judge Norgle wrote that removal would be appropriate if it *clearly* was shown that the amount at issue exceeded \$50,000. No such requirement exists in the law.

Second, the holding imposes a pleading requirement greater than the notice pleading standard of federal practice, and places removing defendants at a jurisdictional disadvantage. In a personal injury case such as *Subaru* or *Toyota*, all that a plaintiff would have to do if filing originally in federal court would be to give notice pleading of the claim. As the Seventh Circuit explained during the survey period, the purpose of the complaint under a notice pleading system is “to advise the other party of the event being sued upon.”²⁹ If a plaintiff makes the same notice-pleading allegations in an action filed in federal court as were made in *Subaru* or *Toyota*, a court would be hard-pressed to say to a legal certainty that more than \$50,000 could not be recovered. The inquiry should not be any different merely because the case comes to federal court through removal.

Third, the portion of *Subaru* showing concern for divesting the state courts of jurisdiction is without legal support. Such a theory smacks of abstention, but there is no abstention doctrine that allows federal courts to relinquish jurisdiction over a diversity claim simply because concurrent jurisdiction lies in a state court. To the contrary, where subject matter jurisdiction is present, the federal courts have a duty to exercise that jurisdiction.³⁰

27. *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1224 (7th Cir. 1991).

28. See 14A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3725 (2d ed. 1985).

29. *Daniels v. USS Agri-Chems.*, 965 F.2d 376, 381 (7th Cir. 1992). See also *Brownlee v. Conine*, 957 F.2d 353, 354 (7th Cir. 1992) (The Federal Rules establish a system of notice pleading rather than of fact pleading.).

30. See, e.g. *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988) (“This Court repeatedly has stated that the federal courts have a ‘virtually unflagging obligation’ to

Fourth, as a policy matter, the *Subaru* method frustrates the goals of avoiding needless expense and delay in federal litigation. It seems unimaginable that in either *Subaru* or *Toyota*, both of which involved auto accidents, it could be said to a legal certainty that the plaintiffs could not recover more than \$50,000. What is probable in such cases is that, after remand, the defendants will elicit facts through discovery to further support removal, and then file a new notice of removal. The result for all involved is extra expense in dealing with removal twice, and likely delays caused by the case bouncing back and forth between state and federal court.

In light of the current push for civil justice reform, it would be more economical to withhold ruling on jurisdiction until such time, perhaps as short as ten days, that the parties present evidence on the issue. Indeed, the Seventh Circuit recently observed that when jurisdiction is at issue, “*sua sponte* dismissals without prior notice or opportunity to be heard are ‘hazardous.’”³¹ Further, at least in actions originally filed in federal court, the Seventh Circuit has stated that “‘unless the [jurisdictional] defect is clearly incurable a district court should grant the plaintiff leave to amend, allow the parties to argue the jurisdictional issue, or provide the plaintiff with the opportunity to discover the facts necessary to establish jurisdiction.’”³² Indeed, in the related setting of a motion to dismiss for want of subject matter jurisdiction, Judge Norgle has correctly observed that the court may hold an evidentiary hearing to determine subject matter jurisdiction, and that there are no specific guidelines on such hearings and “‘any rational mode of inquiry will do.’”³³ Such a hearing, no matter how abbreviated, and even if done by documents and affidavits, would be preferable to an automatic remand.

It is this author’s experience that the federal judges in Indiana do not follow the *Subaru* approach. There does not seem to be the same desire—as appears to exist in the Northern District of Illinois—to scour the docket for cases that can be dismissed for want of jurisdiction.³⁴

exercise their jurisdiction except in those extraordinary circumstances ‘where the order to the parties to repair to the State court would clearly serve an important countervailing interest.’”); *Property & Casualty Ins. v. Central Nat’l Ins.*, 936 F.2d 319, 320-21 (7th Cir. 1991) (“Jurisdiction, if properly conferred, is meant to be exercised.”).

31. *Joyce v. Joyce*, 975 F.2d 379, 386 (7th Cir. 1992) (quoting *Shockley v. Jones*, 823 F.2d 1068, 1072 (7th Cir. 1987)).

32. *Id.* (quoting *Shockley*, 823 F.2d at 1073).

33. *Lumpkin v. United States*, 791 F. Supp. 747, 749 (N.D. Ill. 1992) (quoting *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986)).

34. In the Northern District of Illinois, at least some of the judges apparently review every filing *sua sponte* to check subject matter jurisdiction. See *Lutkowski v. High*

Assuming no such animosity toward federal jurisdiction (and new cases), perhaps there is little need for concern among Indiana practitioners. Nonetheless, to avoid unnecessary expense and delay, practitioners should be aware of potential problems in this area. As Professors Wright and Miller have explained, this is an area of “special difficulty.”³⁵

Plaintiffs filing in federal court should give more than bare notice pleading when it comes to damages, specifying each type of injury, and alleging unequivocally that the amount in controversy exceeds \$50,000. Defendants seeking removal should also state specifically that the amount in controversy exceeds \$50,000. In addition, although Judge Norgle disregarded such statements, removing defendants should go further and outline, based on initial investigations, the facts that support the amount-in-controversy requirement. For instance, if an accident report reveals that the accident was serious, a removing defendant might want to reference that report in the removal notice, and might even incorporate it or similar evidence as an exhibit.

In addition, removing defendants should promptly serve interrogatories inquiring into the scope of plaintiff’s damages. Although responses will not come before the thirty days for removal expires, if the court or the plaintiff later raises the issue, responses likely will be in hand by that time. Finally, if the amount in controversy becomes an issue, the party desiring to stay in federal court should submit evidence in support of its position. If necessary, a request for a prompt evidentiary hearing (on paper or in person) might also be advisable.

C. Federal Question Issues

Federal question jurisdiction exists over “all civil actions arising under the Constitution, laws, or treaties of the United States.”³⁶ Despite this seemingly clear language, the presence of federal question jurisdiction continues to be litigated in this Circuit.

For instance, in *Northrop Corp. v. AIL Systems*,³⁷ Northrop and AIL entered into a “teaming agreement” to work together pursuing a contract from the Air Force for work on the B-1B bomber. Under the agreement, if AIL were named the prime contractor, Northrop would be awarded certain subcontracting work. AIL was awarded the prime

Energy Sports, 768 F. Supp. 224 n.1 (N.D. Ill. 1991) (“This Court always undertakes an immediate review of newly filed complaints.”). Indeed, that is apparently how *Subaru* came before the court, for the plaintiff did not move to remand, and did not contest federal jurisdiction. This author is unaware of any such systematic initial review of actions by Indiana’s federal judges.

35. 14A WRIGHT ET AL., *supra* note 28, § 3725.

36. 28 U.S.C. § 1331 (1988).

37. 959 F.2d 1424 (7th Cir. 1992).

contract, but after Northrop performed some subcontracting work, a dispute arose between Northrop and AIL over Northrop's right to additional work under the teaming agreement. Northrop sued AIL in the Northern District of Illinois for breach of contract, promissory estoppel, and breach of an implied covenant of good faith. Diversity was not present, but Northrop asserted federal-question jurisdiction—not under any federal statutory provision—but instead under “federal common law.”³⁸

The district court dismissed the action for want of jurisdiction, and the Seventh Circuit affirmed.³⁹ The opinion contains an excellent discussion of the contours of obtaining federal jurisdiction based on a federal common law claim. The panel began by noting that although there is no “federal general common law,” federal-question jurisdiction “will support claims founded upon federal common law.”⁴⁰ This unusual source of jurisdiction stems from the Supreme Court's recognition of

the need and authority in some limited areas to formulate what has come to be known as federal common law These instances are few and restricted . . . and fall into essentially two categories: those in which a federal rule of decision is necessary to protect uniquely federal interests . . . and those in which Congress has given the courts the power to develop substantive law.⁴¹

Because no congressional enactment grants federal courts the power to create substantive law for contractor disputes on Air Force projects, the court quickly disposed of this second branch of federal common law jurisdiction.⁴²

The court instead focused on the first branch, which asks whether there is a uniquely federal interest requiring protection by the federal judiciary. In general, such interests are present “‘where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism.’”⁴³ However, this test “is met ‘only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our

38. *Id.* at 1425-26.

39. *Id.* at 1426.

40. *Id.* at 1426.

41. *Id.* (quoting *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 640 (1981)).

42. *Id.*

43. *Id.* at 1426 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 105-06 n.6 (1972)).

relations with foreign nations, and admiralty cases.”⁴⁴ Moreover, the Seventh Circuit added, there must be more than a uniquely federal interest, for that merely establishes a necessary, but not sufficient, condition for displacement of state law. As an additional requirement, a significant conflict must arise between an identifiable federal policy or interest and the application of state law, such that applying state law would frustrate specific objectives of federal legislation.⁴⁵

Applying this strict standard, the Seventh Circuit found federal jurisdiction lacking because Northrop merely disputed the meaning and application of a teaming agreement between two private defense contractors. Although the court recognized that the procurement of equipment by the United States has been held an area of uniquely federal interest, Northrop’s case was too far removed from that interest. Because the federal government was not involved in and would not be directly affected by the outcome of the Northrop litigation, the case did not rise to the level of a federal question.⁴⁶

Finally, the Seventh Circuit recognized that several federal courts have held that federal common law applies to the interpretation of subcontracts entered into pursuant to prime contracts with the federal government.⁴⁷ The Seventh Circuit declined to extend the logic of those subcontract cases to Northrop’s teaming agreement, reasoning that “[s]ubcontracts are agreements to perform work on government projects; teaming agreements are arrangements which *may* give rise to such subcontracts.”⁴⁸ Having thus disposed of federal jurisdiction based on a teaming agreement, the court then observed:

We refuse to express a view as to the desirability of applying federal common law to disputes involving government subcontracts. Nevertheless, we observe that subcontracts which govern actual work being performed on federal projects implicate federal interests much more directly than teaming agreements entered into in the hope that they will lead to government subcontract work.⁴⁹

Thus, in the Seventh Circuit, disputes over teaming agreements for federal projects do not give rise to federal question jurisdiction, but it remains

44. *Id.* (quoting *Texas Indus.*, 451 U.S. at 641).

45. *Id.* at 1426-27.

46. *Id.* at 1427.

47. *Id.* at 1428 (citing *United States v. Taylor*, 333 F.2d 633, 635 (5th Cir. 1964); *American Pipe & Steel v. Firestone Tire & Rubber*, 292 F.2d 640, 641 (9th Cir. 1961); *Grinnel Fire Protection Sys. v. Regents of the Univ.*, 554 F. Supp. 495, 496 (N.D. Cal. 1982)).

48. *Northrop*, 959 F.2d at 1428.

49. *Id.*

an open question whether *subcontract* disputes involving federal projects can lie in federal court. The *Northrop* panel, quite appropriately, left this issue for another day. Practitioners with subcontract disputes on federal jobs should thus at least consider the possibility of litigating such matters in federal court.

In a more common setting, in *Ore-Ida Foods v. Richmond Transportation Service*,⁵⁰ the Northern District of Illinois dismissed a shipper's action against an insurer for want of federal jurisdiction. Ore-Ida had shipped goods via a common carrier, which had obtained certain insurance covering the goods. Ore-Ida sought to collect on the policy for damage to the goods, and filed suit in federal court asserting the case arose under the Interstate Commerce Act. Judge Norgle rejected this argument, reasoning that the Act only states that the Commission "may require" a carrier to obtain insurance, and it creates no rights, duties, or obligations.⁵¹ If a federal question were present in this mere insurance dispute, the court reasoned, "every accident involving a common carrier would end up in the federal courts."⁵²

Finally, in *Forest County Potawatomi Community v. Doyle*,⁵³ a district court within the Seventh Circuit applied the settled rule that specious federal claims cannot bootstrap a state claim into federal court. In dismissing that action, the court explained, "[i]f a plaintiff's claim under the United States Constitution or federal law 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous,' the suit may be dismissed for lack of subject matter jurisdiction."⁵⁴

Thus, *Northrop*, *Ore-Ida*, and *Doyle* all teach that federal-question jurisdiction is zealously guarded in this Circuit, and careful research and analysis are necessary before filing a federal question action.

D. Removal

A number of significant removal cases were decided during the survey period, but are merely highlighted below so that practitioners are aware of these developments:

- (1) A district judge's practice of remanding any removed case in which the plaintiff files a post-removal stipulation to seek no more than \$50,000 is improper. Because the time for determining

50. 783 F. Supp. 382 (N.D. Ill. 1992).

51. *Id.* at 385.

52. *Id.* at 386.

53. 803 F. Supp. 1526 (W.D. Wis. 1992).

54. *Id.* at 1533 (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)).

jurisdiction is the moment of removal, any attempt thereafter to destroy federal jurisdiction is of no avail.⁵⁵

(2) Remand orders—with the exception of those involving civil-rights claims removed under 28 U.S.C. § 1443—are generally not subject to appellate review.⁵⁶

(3) A narrow line of authority does permit review, however, in very limited circumstances when remand was made on grounds outside 28 U.S.C. § 1447(c), or remands not authorized by § 1447(c).⁵⁷

(4) When the district court fails to state its reasons for remand of an action, the Seventh Circuit cannot determine whether the remand is reviewable, so the Seventh Circuit will issue a limited writ directing the district court to provide the essential information.⁵⁸

(5) To avoid confusion on the reviewability of remand orders, the Seventh Circuit has announced that “district courts should accommodate both the litigants and this tribunal by stating reasons for their remand orders. Reasons need not be elaborate; often a sentence will do.”⁵⁹

(6) The prohibition of 28 U.S.C. § 1441(b) that a diversity case cannot be removed if a defendant is a citizen of the forum state is a procedural rather than a jurisdictional limitation. Thus, where such an action is “improperly” removed but the plaintiff fails to seek remand within thirty days for procedural defects under 28 U.S.C. § 1447(c), such a procedural defect is waived.⁶⁰

(7) Whenever an action is removed under the general removal provision of 28 U.S.C. § 1441(a), all defendants must join in the action, and a petition joined by less than all defendants is defective unless it explains the absence of codefendants. Nominal defendants, however, are disregarded for removal purposes, and need not join in the notice.⁶¹

55. *In re Shell Oil Co.*, 970 F.2d 355, 356 (7th Cir. 1992). Thus, in order to defeat removal of a diversity case, a plaintiff must claim less than the jurisdictional amount in its state-court complaint.

56. 28 U.S.C. § 1447(d) (1988); *In re Shell Oil Co.*, 966 F.2d 1130, 1132 (7th Cir. 1992); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992).

57. *Shell Oil*, 966 F.2d at 1132 (citing *Thermtrom Prods. v. Hermansdorfer*, 423 U.S. 336 (1976)); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988); *Rothner v. Chicago*, 879 F.2d 1402 (7th Cir. 1989)); *Amoco Petroleum*, 964 F.2d at 708.

58. *Shell Oil*, 966 F.2d at 1132-33.

59. *Id.* at 1133.

60. *Veltze v. Bucyrus-Erie Co.*, 791 F. Supp. 1363, 1365 (E.D. Wis. 1992).

61. *Lang v. American Elec. Power*, 785 F. Supp. 1331, 1333 (N.D. Ind. 1992).

(8) When there is a "separate and independent" federal claim under 28 U.S.C. § 1441(c), not all defendants need join in the removal notice. In determining whether such a federal claim is separate and independent, it is well settled that a claim arising from the same loss or actionable wrong is not separate and independent, nor is this standard met if the wrongs arise from an interlocked series of transactions or substantially derive from the same facts.⁶²

(9) Under 28 U.S.C. § 1447(c), costs may be assessed against a removing defendant upon a remand to state court. Such an award is generally inappropriate if the defendant raised legitimate and substantial grounds for removal and asserted them in good faith.⁶³ If such costs are appropriate, they may be assessed against the defendants, their attorneys, or both.⁶⁴

(10) When a state-law claim is not originally removable, it may be removed under 28 U.S.C. § 1446(b) within thirty days "after receipt by the defendant . . . of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable."⁶⁵ However, diversity claims may not in any event be removed more than one year after the action was filed in state court.⁶⁶

(11) The subsequent removal option of § 1446(b), however, does *not* apply when the nondiverse defendant was involuntarily dismissed from the case.⁶⁷ Thus, for instance, when summary judgment is granted against a nondiverse defendant, the case cannot be removed because of this "voluntary/involuntary" dismissal rule. The rationale for this rule is two-fold. First, such a state-court decision could be appealed and reversed, thus leading to a "yo-yo effect" between federal and state jurisdiction. Second, the federal courts have shown some deference to plaintiffs' choice of forum, while at the same time not wishing to expand diversity jurisdiction any further.⁶⁸

(12) Thus, under the voluntary/involuntary dismissal rule, only a plaintiff's voluntary act of dismissing a nondiverse defendant

62. *Id.* at 1333-34.

63. *Id.* at 1335.

64. *Wisconsin v. Missionaries to the Preborn*, 798 F. Supp. 542, 544 (E.D. Wis. 1992).

65. 28 U.S.C. § 1446(b) (1988).

66. *Id.* See also *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 71 (7th Cir. 1992).

67. *Poulos*, 959 F.2d at 72 (deciding a case of first impression in the Seventh Circuit, and following the majority rule in the country).

68. *Id.*

will allow removal under 28 U.S.C. § 1446(b). The scope of the rule, however, was left open by the Seventh Circuit. After noting with “some sympathy” that the Second Circuit treats a *non-appealed* state-court dismissal as a voluntary dismissal that will allow removal,⁶⁹ the Seventh Circuit declined to resolve this issue because it had not been briefed.⁷⁰

Finally, in a case of first impression requiring more than summarized treatment, the Seventh Circuit addressed the fraudulent joinder doctrine in *Poulos v. Naas Foods*.⁷¹ In *Poulos*, a sales representative sued his employer in a Wisconsin court for violations of Wisconsin’s Fair Dealership Law. The sales representative was a citizen of Illinois, and his employer was an Indiana citizen. Thus, diversity existed between plaintiff and his employer. The plaintiff also sued a holding company that owned the employer. However, that holding company was, like the plaintiff, a citizen of Illinois. Thus, on the face of the complaint diversity was lacking.⁷²

The case was removed, however, on the grounds of fraudulent joinder. The district court denied the plaintiff’s motion to remand, agreeing with the employer that the holding company had been fraudulently joined to defeat federal jurisdiction.⁷³ The Seventh Circuit affirmed the finding of fraudulent joinder, noting that it had never before addressed the issue.⁷⁴

Writing for the panel, Judge Cudahy observed that although false allegations of jurisdictional facts may make joinder fraudulent, “in most cases fraudulent joinder involves a claim against an in-state defendant that simply has no chance of success, whatever the plaintiff’s motives.”⁷⁵

69. *Id.* (citing *Quinn v. Aetna Life & Casualty*, 616 F.2d 38, 40 n.2 (2d Cir. 1980)).

70. *Id.* at 72 n.3. There is thus uncertainty in the Seventh Circuit concerning what conditions will allow an originally nonremovable state-court action to be removed based on a dismissal of a nondiverse defendant. The court in *Poulos* was at least somewhat sympathetic to the Second Circuit’s view that the dismissal is “voluntary” when the plaintiff does not appeal. Application of this rule, however, would cause at least some confusion, for the defendants ordinarily would not know whether the plaintiff had appealed until the thirty days for removal under 28 U.S.C. § 1446(b) had expired. For now, uncertainty will remain, but for defendants interested in a federal forum, consideration should be given to trying the Second Circuit’s approach.

71. 959 F.2d 69 (7th Cir. 1992).

72. *Id.* at 70-71.

73. *Poulos v. Naas Foods*, 132 F.R.D. 513, 519 (E.D. Wis. 1990), *aff’d*, 959 F.2d 69 (7th Cir. 1992).

74. *Poulos*, 959 F.2d at 73.

75. *Id.*

An out-of-state defendant seeking removal bears a "heavy burden" to establish fraudulent joinder:

The defendant must show that, after resolving all issues of fact *and law* in favor of the plaintiff, the plaintiff cannot establish a cause of action against the in-state defendant. At the point of decision, the federal court must engage in an act of prediction: is there any reasonable possibility that a state court would rule against the non-diverse defendant? If a state court has come to [a] judgment [against the plaintiff], is there any reasonable possibility that the judgment will be reversed on appeal?⁷⁶

Applying these standards, the panel held that there was no reasonable possibility that the holding company would be liable for the acts of its subsidiary.⁷⁷ The plaintiff had made no allegations of direct involvement by the parent, and had made no allegations that would support piercing the subsidiary's corporate veil. Thus, because plaintiff had no chance of recovering against the parent, fraudulent joinder existed, and the citizenship of the parent could not defeat diversity.⁷⁸

The Seventh Circuit reiterated the rule of 28 U.S.C. § 1446(b) that removal is required within thirty days of learning that removal is possible, and the court stated that in this case—as in any case of fraudulent joinder—the defendant should have removed the action within thirty days of service of the complaint, because at that time the defendant could have discovered that joinder was fraudulent. The defendant had failed to follow this thirty-day rule, but the plaintiff "did not notice the error, and the 30-day limit in section 1446(b) can be waived."⁷⁹

The lessons of *Poulos* are thus three-fold. First, defendants should be on the watch for fraudulent joinder and should file removal based on fraudulent joinder within thirty days of service of the complaint. Second, if the thirty-day limitation of § 1446(b) has passed, defendants still should consider a notice of removal if the absolute one-year limitation of § 1446(b) has not expired. Third, plaintiffs whose cases are removed *after* the thirty-day period should raise this procedural defect in a prompt motion to remand.⁸⁰

76. *Id.* (citation omitted).

77. *Id.* at 74.

78. *Id.* at 73-74.

79. *Id.* at 73 n.4.

80. One other lesson from *Poulos* is that in speaking of diversity of citizenship, practitioners should not refer to "residency," but should instead talk of citizenship or domicile. The panel made a point of criticizing the defendant's removal papers for referring to residency, noting that diversity jurisdiction "requires diversity of citizenship, and mere residence has never been enough to establish citizenship." *Id.* at 70 n.1. The court also

II. PERSONAL JURISDICTION

In *Dehmlow v. Austin Fireworks*,⁸¹ the Seventh Circuit reaffirmed its commitment to the stream of commerce theory of personal jurisdiction.⁸² Under this theory, a manufacturer or seller is subject to personal jurisdiction in the forum state if it delivers its products into the forum state with the expectation that they will be purchased by consumers in that state. The last word from the Supreme Court on the doctrine came in *Asahi Metal Industry v. Superior Court*,⁸³ in which the Court could not reach a majority view on the subject.

In *Dehmlow*, the Seventh Circuit noted the uncertainty on the issue after *Asahi*, but nonetheless felt bound by the stream of commerce theory that originated in *World-Wide Volkswagen v. Woodson*.⁸⁴ The Seventh Circuit explained, "This Circuit has repeatedly endorsed the 'stream of commerce theory' and has resolved cases on the basis of it."⁸⁵ Further, Judge Cummings observed that because the

Supreme Court established the stream of commerce theory, and a majority of the Court has not yet rejected it, we consider that theory to be determinative. We may not depart from Court precedent on the basis of a belief that present Supreme Court Justices would not readily agree with past Court decisions.⁸⁶

The *Dehmlow* decision thus confirms, as Judge McKinney had held in 1989, that the stream of commerce theory is the law of this Circuit.⁸⁷

III. SERVICE OF PROCESS

Federal Rule of Civil Procedure 4(c)(2)(C)(ii) allows for service by "mailing a copy of the summons and complaint (by first-class mail,

commented that "people are not domiciles, rather, they *have* domiciles." *Id.* Thus, proper allegations would be that plaintiff is a citizen of State X, or that plaintiff is a domiciliary of State X, or plaintiff is domiciled in State X. This is, of course, quite picky, but the Seventh Circuit is a stickler on such points, particularly because they affect jurisdiction.

81. 963 F.2d 941 (7th Cir. 1992).

82. *Id.* at 946.

83. 480 U.S. 102 (1987).

84. 444 U.S. 286, 297-98 (1980).

85. *Dehmlow*, 963 F.2d at 946.

86. *Id.* at 947 (citations omitted).

87. See *Curtis Management Group v. Academy of Motion Picture Arts & Sciences*, 717 F. Supp. 1362, 1367-71 (S.D. Ind. 1989) (discussing *World-Wide Volkswagen*, *Asahi*, and various Seventh Circuit decisions, and concluding that "[b]ecause the Supreme Court could not agree to a standard, and because the Seventh Circuit has not addressed the issue since the *Asahi* decision, this District Court must continue to apply the stream of commerce theory set forth in *World-Wide Volkswagen* and used in the Seventh Circuit in prior decisions").

postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 18-A and a return envelope, postage prepaid, addressed to the sender.”⁸⁸ In *Audio Enterprises v. B & W Loudspeakers*,⁸⁹ the Seventh Circuit held that service by Federal Express does *not* constitute “mailing” under this Rule, and that such service is insufficient to confer personal jurisdiction.⁹⁰ With little discussion, the court simply reasoned that the Rule speaks of “mailing” in the terms of “first class mail,” and concluded that “Federal Express is not first class mail.”⁹¹

In the same decision, the Seventh Circuit also held that service was defective under Rule 4(c)(2)(C)(ii) because no acknowledgment form had ever been filed with the district court clerk.⁹² The court observed that the rule “in this and other circuits is that service by mail is not complete until an acknowledgment form is filed with the court.”⁹³ Despite the defendant’s knowledge of the suit, service was not complete or effective under Rule 4(c)(2)(C)(ii) until that form—acknowledging the defendant’s receipt of service—was filed.⁹⁴

It is possible that this acknowledgment filing requirement does not apply where the plaintiff serves under Rule 4(c)(2)(C)(i), which allows service under the forum-state’s service provisions. Indiana’s Trial Rules 4.1 and 4.6 allow individuals and organizations to be served by registered or certified mail, and Indiana Trial Rule 4.11 then provides that the return shall be filed by the clerk. It is at least arguable that when Indiana’s service rules are utilized for service under Federal Rule of Civil Procedure 4(c)(2)(C)(i), the mere filing of the certified mail return receipt card—without the separate federal Form 18-A acknowledgement form—constitutes the last step of service. Both measures appear aimed

88. FED. R. CIV. P. 4(c)(2)(C)(ii).

89. 957 F.2d 406 (7th Cir. 1992).

90. *Id.* at 409.

91. *Id.*

92. *Id.*

93. *Id.* (quoting *Geiger v. Allen*, 850 F.2d 330, 332 n.3 (7th Cir. 1988)).

94. *Id.* at 409. This holding is initially consistent with Rule 4(g), which requires the person serving the process to make proof of service to the court promptly “and in any event within the time during which the person served must respond to the process.” Rule 4(g) further states that if service is made under subdivision (c)(2)(C)(ii) of this rule, “return shall be made by the sender’s filing with the court the acknowledgment form received pursuant to such subdivision.” The next sentence of Rule 4(g), however, then states that “[f]ailure to make proof of service does not affect the validity of service.”

It is unclear what role, if any, Rule 4(g)’s last sentence plays in this equation. The *Audio Enterprises* court never mentioned it, and there is an apparent split of authority on this issue across the country. *See generally* 4A WRIGHT ET AL., *supra* note 28, § 1092.1, at 57 (and cases cited therein). It appears, however, that in the Seventh Circuit Rule 4(g) does not mean what it says.

at the same end, namely, proof of service. It should be noted that Magistrate Judge Cosbey has expressly held that when Indiana's service rules are used the mere filing of the return receipt card is sufficient.⁹⁵

It is this author's experience that this appears to be a common practice in federal court in Indiana. Indeed, both the Northern and Southern Districts of Indiana have local rules stating that in certain circumstances, filing of the return receipt card is *prima facie* proof of service.⁹⁶ To be safe, and in particular to avoid overlooking those instances when local rules do not speak to filing the return receipt card, plaintiffs might consider covering both bases by following the letter of Rule 4(c)(2)(C)(ii) and its acknowledgment form service and filing requirement, as well as by filing the proof of service under Rule 4(g) with the certified return receipt card. At the very least, plaintiffs should ensure that if Rule 4(c)(2)(C)(i)'s state-law method of service is used, the letter of Indiana Rule 4 is followed and the return receipt card is promptly filed.

In a related service of process case, the Seventh Circuit in *TSO v. Delaney*,⁹⁷ held that plaintiffs had failed to effect timely service within the 120-day limitation of Federal Rule of Civil Procedure 4(j) when they did not file the acknowledgment form in that time period.⁹⁸ The court reiterated that under Rule 4(c)(2)(C)(ii), service is not complete until the acknowledgment form is filed. Although Rule 4(j) excuses the failure to complete service within 120 days for "good cause," the court applied the Seventh Circuit's narrow standard for good cause under Rule 4(j), and held that the attorney's mere ignorance of the acknowledgment requirement was no excuse.⁹⁹

Thus, *TSO* teaches not only that plaintiffs must ensure that the defendants receive the summons and complaint within 120 days under one of Rule 4's prescribed methods of service, but also that plaintiffs must ensure that the proof of service—whether it be the acknowledgment form under Rule 4(c)(2)(C)(ii) or a return receipt card under Rule 4(c)(2)(C)(i)'s incorporation of Indiana's method of service, or both—*must* be filed with the clerk within 120 days as well. Thus, plaintiffs should diary this deadline, leaving sufficient time to effect alternative service and filing of proof of service if initial attempts at service are unsuccessful.

95. *Darlington Farms v. Springwater Cookies & Confections*, No. 91-228, slip op. at 6-9 (N.D. Ind. Nov. 7, 1991).

96. U.S. DISTRICT CT. RULES S.D. IND. R. 5.1(e); U.S. DISTRICT CT. RULES N.D. IND. R. 7(f).

97. 969 F.2d 373 (7th Cir. 1992).

98. *Id.* at 376.

99. *Id.*

In addition, *TSO* teaches that defendants interested in litigating such procedural issues should also diary the 120-day deadline, check the docket for proof of service, and, if plaintiff has omitted this last prerequisite for service, consider moving to dismiss. It is this author's experience, both in practice and while as a law clerk in federal court, that the filing of such proof of service is often forgotten by plaintiffs. In order to preserve such a defective service claim, defendants would need to raise the issue by a motion to dismiss under Rule 12(b)(5) with their first responsive pleading, even though that would ordinarily occur before the 120 days had expired.

IV. SPECIFICITY OF PLEADING

Federal Rules of Civil Procedure 8 and 9 speak to the requisite level of pleading, a subject that continues to generate reported decisions. Rule 8 simply requires a "short and plain statement" of the basis for jurisdiction and of the claim presented, plus a demand for judgment for the relief sought. Despite this liberal standard, defendants often attack plaintiffs' complaints as insufficiently specific.

In *Daniels v. USS Agri-Chemicals*,¹⁰⁰ for instance, the defendant sought dismissal of one of the plaintiff's claims on the grounds that the plaintiff improperly sought to press a claim based on Illinois's wrongful death statute rather than Indiana's, which actually applied. The court explained that all that is required is notice pleading, with only the operative facts. The court added:

Neither federal nor Indiana pleading rules require the complaint to include even a theory of the case, much less the statutory basis for recovery. Moreover, specifying an incorrect theory is not fatal. Complaints are to be construed liberally; the court should ask whether relief is possible under any set of facts that could be established consistent with the allegations. This approach is consistent with the purpose of the complaint under a notice pleading system, which is to advise the other party of the event being sued upon.¹⁰¹

In *Brownlee v. Conine*,¹⁰² the Seventh Circuit similarly explained the liberal standards of notice pleading, though with some apparent sarcasm towards the district judge who had dismissed a prisoner's claim as "conclusory" and "stale." After calling this basis of dismissal "not a very happy formula," Judge Posner explained that the Federal Rules

100. 965 F.2d 376 (7th Cir. 1992).

101. *Id.* at 381 (citations and quotations omitted).

102. 957 F.2d 353 (7th Cir. 1992).

establish a system of notice pleading rather than fact pleading, "so the happenstance that a complaint is 'conclusory,' whatever exactly that overused lawyers' cliché means, does not automatically condemn it."¹⁰³ In civil-rights cases, all the complaint need do is "'outline or adumbrate'"¹⁰⁴ a violation of the statute or constitutional provision upon which the plaintiff relies, and connect the violation to the named defendants."¹⁰⁵

Judge Posner then turned to the staleness dismissal, writing, "[a]s for 'staleness,' that is a more disabling criticism of a bread than of a complaint, unless by this term the district judge meant barred by the statute of limitations."¹⁰⁶ Because some of the prisoners' claims were clearly not time-barred, the dismissal on this basis was also reversed.¹⁰⁷

Rule 9(b), by contrast, requires averments of fraud or mistake be stated with particularity. In *Uni*Quality v. Infotronx*,¹⁰⁸ the Seventh Circuit addressed Rule 9(b) in the context of a plaintiff's attempt to show a continuous pattern of racketeering activity. After the Supreme Court's decision in *H.J. Inc. v. Northwestern Bell Telephone*,¹⁰⁹ a Racketeer Influenced and Corrupt Organizations Act (RICO)¹¹⁰ claim requires a pattern of related and continuous predicate acts, and those extending over a few weeks or months and threatening no future criminal conduct do not satisfy the continuity requirement.¹¹¹ The plaintiff in *Uni*Quality* was able to show only one scheme by the defendant lasting at most seven to eight months, and the Seventh Circuit held that this was insufficient under *Northwestern Bell*.¹¹²

In a further effort to show a pattern of continuing racketeering activity, plaintiff also argued that the defendant engaged in similar acts with third parties. However, the only specific allegation was that defendant hired other companies and "upon information and belief none of those companies has been paid in full."¹¹³ Such pleading, the Seventh Circuit held, fails Rule 9(b)'s particularity standard, which requires plaintiff to plead the "who, what, when and where" of the alleged

103. *Id.* at 354.

104. Judge Posner's term, not the author's, who must confess prior ignorance of the term.

105. *Id.* (citations omitted).

106. *Id.*

107. *Id.* In closing, Judge Posner added, "Most prisoner civil rights cases are frivolous, but district judges, busy as they are, must not assume that all are and dismiss them by rote. They may not throw out the haystack, needle and all." *Id.* at 355.

108. 974 F.2d 918 (7th Cir. 1992).

109. 492 U.S. 229 (1989).

110. 18 U.S.C. §§ 1961-68 (1988).

111. *Id.* at 236-43.

112. *Uni*Quality*, 974 F.2d at 922.

113. *Id.* at 923.

fraud.¹¹⁴ It is true, the court said, that where a plaintiff is alleging fraud against a third party, less detail may be required because the plaintiff may not have access to all facts.¹¹⁵ In this case, however, the allegations amounted to nothing more than claims that the defendant did not pay its bills.

Finally, the court explained that Rule 9(b) served its "important purpose" here:

Accusations of fraud can seriously harm a business. This is especially so in RICO cases where those accusations of fraud lead to the probably more damaging accusation that the business engaged in 'racketeering.' Rule 9(b) ensures that a plaintiff have some basis for [its] accusations of fraud before making those accusations[,] and thus discourages people from including such accusations in complaints simply to gain leverage for settlement or for other ulterior purposes.¹¹⁶

V. FILING — RULE 5

Effective December 1, 1991, Federal Rule of Civil Procedure 5(e) was amended to limit the power of clerks to reject tendered filings. Amended Rule 5(e) now contains the following statement: "The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices." This is a significant change, because previously the clerks and their deputies—typically nonlawyers without extensive training in the Federal Rules—could reject filings if they believed they did not comply with some rule or standing order. Indeed, even the Southern District of Indiana's current local rules, adopted on February 1, 1992, purport to allow the clerk to reject a filing that is not signed by an attorney under Federal Rule 11.¹¹⁷

The change in Rule 5(e) does not prohibit judges, of course, from striking or prohibiting filings, for the rule speaks only to clerks. Indeed, in one recent case from the Northern District of Illinois, Judge Lindberg struck a motion that the clerk had properly accepted for filing for the

114. *Id.* This includes the "identity of the person making the representation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *Id.*

115. *Id.*

116. *Id.* at 924.

117. U.S. DISTRICT CT. RULES S.D. IND. R. 5.1(b). This local rule is thus in need of amendment as it conflicts with FED. R. CIV. P. 5(e). A suitable amendment would be to allow a judge to strike any such filing.

simple reason that the motion was not bound at the top and exceeded fifteen pages, both violations of that court's local rules.¹¹⁸

The lessons are two fold. First, practitioners should know the local rules of the courts in which they practice. Failure to comply with local rules—particularly in the Northern District of Illinois—can be devastating. Second, attorneys and those who file papers for them must be aware that clerks cannot refuse their filings. Many filings, of course, are made on the last day possible, and practitioners cannot jeopardize their cases by a clerk's unfamiliarity with Rule 5(e). If a deputy clerk does refuse a filing, Rule 5(e) should be stressed. If that fails, the actual clerk of the court should be consulted, and then a magistrate or district judge. If these measures fail, the tendered filing should at least be marked by the clerk's office as tendered on that date. Whatever defect concerned the clerk should then be promptly corrected with a subsequent filing.

VI. AMENDMENT OF PLEADINGS — RULE 15

Federal Rule of Civil Procedure 15(a) allows amendments to pleadings as of right any time before a responsive pleading is served. Otherwise a pleading can only be amended with the opponent's consent or with leave of the court, which is to "be freely given when justice so requires."¹¹⁹ Rule 15(c) then deals with relation back of amendments. Several decisions addressing amendments are highlighted below:

- (1) A district judge abused his discretion in allowing a defendant to amend its answer more than three years after it was originally filed to add the affirmative defense of exhaustion of remedies.¹²⁰
- (2) The Seventh Circuit held that the December 1, 1991, amendments to the relation-back provisions of Rule 15(c)(3) do not apply retroactively.¹²¹
- (3) In a case where a civil-rights plaintiff originally named "unknown officers," and then named specific officers in an amended complaint after the limitations period, the amendment did not relate back because—although the individual defendants had notice of the initial suit within 120 days of its filing as required by Rule 15(c)—there was no "mistake" on the plaintiff's part as to the officers' identity as the Seventh Circuit requires;

118. *Transamerica Corp. v. National Union Fire Ins.*, 143 F.R.D. 189 (N.D. Ill. 1992).

119. FED. R. CIV. P. 15(a).

120. *Daughterity v. Traylor Bros., Inc.*, 970 F.2d 348, 351-53 (7th Cir. 1992).

121. *Diaz v. Shallbetter*, 984 F.2d 850 (7th Cir. 1993).

instead, the plaintiff simply did not know who they were.¹²²

(4) In a federal action, including one based on diversity, the federal version of Rule 15(c) rather than a state's version governs the relation-back issues.¹²³

Finally, in a civil-rights action involving several Indianapolis police officers, Judge Tinder ruled that an amendment related back where the original complaint incorrectly named officer "Jeff King" as a defendant, the actual defendant was officer "John King," and officer John King had notice of the action.¹²⁴

In so doing, Judge Tinder observed that defense counsel was present when one of his other clients incorrectly testified in a deposition that officer *Jeff* King was involved, and that defense counsel filed the deposition knowing this to be false without correcting the error. Judge Tinder further noted that defense counsel did not move to dismiss the pending claim against Jeff King, who had nothing to do with the incident in question. Judge Tinder observed that, in the abstract, attorneys may have no duty to inform opponents that they have misidentified the proper defendant. In this case, however, defense counsel's conduct of not correcting the erroneous deposition testimony and not dismissing the improper defendant revealed tactics of an "unseemly color."¹²⁵

VII. PRELIMINARY INJUNCTION STANDARDS

In *Abbott Laboratories v. Mead Johnson & Co.*,¹²⁶ a panel of the Seventh Circuit went to great lengths to clarify the standards for evaluating a request for a preliminary injunction. After noting that "con-

122. *Id.* at 834-35 (citing *Wood v. Worachek*, 618 F.2d 1225, 1230 (7th Cir. 1980); *Rylewicz v. Beaton Servs.*, 888 F.2d 1175, 1181 (7th Cir. 1989)). Chief Judge Mihm offered a well-reasoned criticism of this line of authority, observing that in his view the "mistake" language of Rule 15(c)(3) does not create a new, separate prerequisite for relation back. The focus, he stated, should be on notice to the defendant, and not on what state of mind (ignorance or mistake) brought about the initial failure to name the defendant. He further noted that a complaint that names unknown officers puts the actual defendants on some notice that they might be sued, whereas a complaint with a mistakenly named defendant does not assist the actual parties involved in knowing that they might be sued. Judge Mihm's analysis is commendable, and for plaintiffs stuck in this untenable position, should be advanced at the district court and on to the Seventh Circuit in an effort to change the standard.

123. *Worthington*, 790 F. Supp. at 835-37 (citing *Lewellen v. Morley*, 875 F.2d 118 (7th Cir. 1989)).

124. *Owens v. Mills*, No. IP91-012-C (S.D. Ind. Nov. 6, 1991) (order granting leave to amend complaint).

125. *Id.*, slip op. at 20 n.10.

126. 971 F.2d 6 (7th Cir. 1992).

fusion persists” among the bar on this subject, the court outlined the following basic standard:

As a threshold matter, a party seeking a preliminary injunction must demonstrate (1) some likelihood of succeeding on the merits, and (2) that it has ‘no adequate remedy at law’ and will suffer ‘irreparable harm’ if preliminary relief is denied. If the moving party cannot establish either of these prerequisites, a court’s inquiry is over and the injunction must be denied. If, however, the moving party clears both thresholds, the court must then consider: (3) the irreparable harm the non-moving party will suffer if preliminary relief is granted, balancing that harm against the irreparable harm to the moving party if relief is denied; and (4) the public interest, meaning the consequences of granting or denying the injunction to non-parties.¹²⁷

Writing for the panel, Judge Flaum then observed that the trial court “weighs” all four factors, “seeking at all times to minimize the costs of being mistaken.”¹²⁸ Under this “sliding scale” approach, “the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side; the less likely it is the plaintiff will succeed, the more the balance need weigh toward its side.”¹²⁹ Thus, Judge Flaum explained, it is *not* true that if the balance of irreparable harms tips towards the defendant, the preliminary injunction must be denied regardless of the strength of plaintiff’s case on the merits.¹³⁰

Concerning the “public interest” inquiry, Judge Flaum rejected the characterization that the movant must show that the injunction would not harm the public interest. Although there is at least support for such a statement from prior Seventh Circuit dictum, the panel in *Abbott Laboratories* “question[ed] whether it accurately characterizes the law of the circuit.”¹³¹ Rather than a dispositive requirement that the public interest not be harmed, Judge Flaum described the public interest analysis as “one factor courts must consider in weighing the equities; it is not dispositive.”¹³²

127. *Id.* at 11-12 (citations omitted).

128. *Id.* at 12 (quotation omitted).

129. *Id.*

130. *Id.* at 12 n.2.

131. *Id.* n.3 (citing *Brunswick Corp. v. Jones*, 784 F.2d 271, 274 n.1 (7th Cir. 1986)).

132. *Id.*

The panel then illustrated the application of its understanding of the public interest prong, writing:

Suppose, to take a simple example, that the balance of harms tips significantly in plaintiff's favor, that plaintiff has an overwhelming chance of succeeding on the merits, but that granting the injunction would ever so slightly impair the public interest (*e.g.*, by removing one of ten products from a given product market). In this instance, preliminary relief would be proper even though it might harm the public interest.¹³³

Finally, Judge Flaum observed that the entire balance can often turn on the nature of the available preliminary relief. For instance, in *Abbott Laboratories* the parties and the district court had addressed the preliminary injunction as an all-or-nothing proposition: either the product would be removed from the market to avoid trademark problems or it would remain on the market. On appeal, the Seventh Circuit saw other options, such as leaving the product on the market but ordering the alleged infringing practices (deceptive advertising, etc.) to cease and desist.¹³⁴ The court explained:

[T]he district court's analysis suffered from its near exclusive focus upon the most drastic remedies requested by Abbott (*e.g.*, 'product recall) to the exclusion of less severe remedies (*e.g.*, corrective advertising). This focus, we learned at argument, resulted from the district court's decision to adopt, nearly verbatim, the proposed findings . . . submitted by the parties; . . . Each party . . . tried to hit a home run . . . [and] [n]either offered alternative conclusions that steered a reasonable middle ground. So, when it came time for the court to assess the impact upon the parties and the public of granting or denying preliminary relief, the court considered only the impact of either granting the most severe relief or shutting [plaintiff] out altogether.¹³⁵

The Seventh Circuit commented that when counsel draft proposed conclusions for preliminary injunctions, they "should bear in mind a crucial observation . . . : courts retain a great deal of flexibility when fashioning preliminary relief, and the equities weighed under the four-part preliminary injunction standard can shift as the nature of that relief varies."¹³⁶ Although the panel recognized the widespread practice of

133. *Id.*

134. *Id.* at 17-18.

135. *Id.* at 22-23.

136. *Id.* at 23 (citations omitted).

“busy district courts” to adopt many or most of the parties’ proposed findings, it noted that “district judges also should bear in mind our observations regarding the nature of preliminary relief, and, when presented with proposed findings and conclusions that hug the extremes, consider developing alternatives of their own.”¹³⁷

Thus, *Abbott Laboratories* is essential reading for any practitioner involved in preliminary injunction proceedings. The decision clarifies the analysis, and recommends that practitioners and district judges consider middle-of-the-road compromises in addressing these difficult issues. For a plaintiff that truly wants the home run, such as pulling an offending product off the market, this is probably bad news. On the other hand, those resisting such a motion can offer compromise solutions that allow their clients to keep their products on the market, for instance, though perhaps with some ameliorating, interim steps such as different advertising or labeling.

VIII. DISCOVERY

Several significant discovery developments are highlighted below:

(1) In a case of first impression in the Seventh Circuit, Judge Easterbrook held in *Reise v. Board of Regents*,¹³⁸ that a district court’s order requiring a plaintiff to submit to an examination under Federal Rule of Civil Procedure 35 is *not* a final decision appealable under 28 U.S.C. § 1291, nor does it fall under the “collateral order” exception allowing immediate appeal.¹³⁹ The Seventh Circuit declined to follow a Fifth Circuit decision to the contrary, and succinctly summarized the many reasons why such discovery orders are not immediately appealable.¹⁴⁰

(2) Also in a case of first impression in the Seventh Circuit, Judge Brooks held that an expert who will testify only as to historical facts—and not in any way as to matters acquired or developed in anticipation of litigation—is *not* covered by Federal

137. *Id.*

138. 957 F.2d 293 (7th Cir. 1992).

139. *Id.* at 294-95.

140. *Id.* at 294-96 (refusing to follow *Acosta v. Tenneco Oil Co.*, 913 F.2d 205 (5th Cir. 1990)). After *Reise*, a plaintiff ordered to submit to an examination has two options: submit to the examination and bring the matter up with the final judgment, or refuse to submit to the examination, taking the risk of sanctions under Rule 37, such as striking of the claims for the physical or mental damages for which the exam was ordered. As Judge Easterbrook explained, “[R]equiring the complaining part[ies] to take some risk—to back up [their] belief with action—winnows weak claims. Only persons who have *substantial* objections to the examination and believe their legal positions strong will follow a path that could end in defeat.” *Id.* at 295-96.

Rule of Civil Procedure 26(b)(4), and thus *may* be interviewed *ex parte* by opposing counsel.¹⁴¹ The opinion emphasizes that the plaintiff, in seeking a protective order, failed to come forth with any evidence showing that the experts would testify concerning anything other than historical facts. In addition, the opinion implicitly suggests that if the expert has mixed historical facts and matters prepared in anticipation of litigation, Rule 26(b)(4) probably does apply, and interrogatories and a possible deposition are the only way to talk with that expert.

(3) In a detailed opinion, Magistrate Judge Foster held that documents developed by an insurer to evaluate an insured's claim in the regular course of business are not work-product.¹⁴² Documents prepared in the ordinary course of business prior to denial of a claim are presumed not to be work product, while matters prepared after denial of a claim are presumed to be work product. In both instances the presumptions can be rebutted by specific evidence.¹⁴³

(4) A personal-injury plaintiff sought to compel the deposition of a Kansas individual defendant in Indiana. After noting the general rule that such defendants may insist on being deposed in their home district, Magistrate Judge Rodovich required the defendant to travel to Indiana to be deposed, primarily because his defense lawyer had delayed for more than a year in scheduling the deposition and discussing plaintiff's proposal to split the cost of bringing the defendant to Indiana.¹⁴⁴

(5) Judge Miller ordered Tom Monaghan, the owner and chief executive of Domino's Pizza, to submit to a deposition in a personal-injury case based on Domino's thirty-minute guarantee. Monaghan, a named defendant, had moved for summary judgment and resisted the deposition on the grounds that he was not personally liable and that other representatives could testify concerning the policy. Judge Miller held that Monaghan's summary judgment affidavit could be tested in the deposition, and that his role in the development of the policy was a proper subject of inquiry.¹⁴⁵ In addition, Judge Miller noted Monaghan's

141. *Abner J. Horrall & Sons v. Petoseed Co.*, No. TH89-269-C (S.D. Ind. Sep. 22, 1992) (order denying motion for protective order).

142. *Harper v. Auto-Owners Ins.*, 138 F.R.D. 655, 663 (S.D. Ind. 1991).

143. *Id.* Judge Foster further held that he requires a "Vaughn index" outlining, for each document withheld on privilege or immunity, the author, recipient, their capacities, its subject matter, and a specific explanation of why the document is privileged or immune. *Id.* at 664.

144. *Undraitis v. Luka*, 142 F.R.D. 675, 677 (N.D. Ind. 1992).

145. *Wauchop v. Domino's Pizza*, 143 F.R.D. 199, 202 (N.D. Ind. 1992).

pattern of delaying and frustrating discovery, which seems to have been taken into account in ordering the executive's deposition.¹⁴⁶

(6) Magistrate Judge Pierce imposed sanctions on plaintiff's counsel for instructing his client not to answer certain questions and then unilaterally terminating the deposition upon the mistaken belief that, because he had declined to cross-examine the deponent, the opposing parties were precluded from asking further questions. Judge Pierce observed that depositions are not limited to the strict sequence followed at trial, and that under Rule 30(c), except where a question calls for privileged information, it is *improper* for counsel to instruct a deponent not to answer.¹⁴⁷

IX. SUMMARY JUDGMENT

Several key decisions addressed summary judgment practice. For instance, in *Porter v. Whitehall Laboratories*,¹⁴⁸ Judge Tinder addressed the issue of the sufficiency of expert testimony at summary judgment. Plaintiff alleged that ibuprofen was the legal cause of his acute renal failure. Defendants moved for summary judgment, and plaintiff responded by proffering expert testimony. After noting Federal Rule of Civil Procedure 56(c)'s command that only admissible evidence can be used at summary judgment, the court found the experts' testimony inadmissible because it was not based on facts, but instead merely on subjective speculation.¹⁴⁹

Judge Tinder observed that every expert in the case agreed there was no scientific data showing a causal link between ibuprofen and renal failure. Instead, the experts—though well qualified—offered “a mere possibility of an unsupported and therefore hypothetical explanation for the acute renal failure.”¹⁵⁰ The following lengthy passage is particularly instructive:

Merely because an opinion of scientific causation comes from a person learned in medical science does not provide that opinion

146. *Id.* at 205.

147. *Smith v. Logansport Community Sch. Corp.*, 139 F.R.D. 637 (N.D. Ind. 1991). Judge Pierce confirmed that once a deposition is commenced, protection against abuse is afforded under Rule 30(d), which permits the court to enter a protective order once a party has shown that the deposition is being conducted in bad faith or to annoy, embarrass, or oppress the witness. If these conditions exist, counsel should suspend the deposition, state any complaints on the record, and immediately apply for protection under Rule 30(d). Judge Pierce stressed, however, that those who terminate a deposition risk sanctions if the motion lacks a substantial basis. *Id.* at 640.

148. 791 F. Supp. 1335 (S.D. Ind. 1992).

149. *Id.* at 1342-44.

150. *Id.* at 1344.

with a sufficient scientific basis. An expert cannot rely solely on his or her own stature, intellect or intuition to support an opinion The basis—the ‘reasoning’ *and* ‘facts and data’—of an opinion is distinct from the expert’s qualifications as an expert in the field. An expert’s qualifications reflect the expert’s knowledge of relevant scientific facts and skill in making comparative judgments. The factual basis of a particular medical conclusion is composed of an application of particular scientific facts to particular data about the instant case. Admissible opinions relate instant facts to known relationships; an opinion relating instant facts to an unknown relationship (a hypothesis) does not further the trier of fact’s ability to determine a fact dependent upon that hypothetical relationship. Although experts may provide opinions in the form of a hypothetical fact *situation*, the scientific foundation or reasoning process may not be based on merely hypothetical causal *relationships*. Unsupported subjective opinion is unhelpful speculation and not admissible under [Federal Rule of Evidence] 702.¹⁵¹

The *Porter* analysis applies at trial as well as summary judgment, but is more likely to confront practitioners at summary judgment, both because there are simply more summary judgment motions than trials, and because experts often are not fully prepared at the summary judgment stage. Practitioners should be alert to *Porter* and similar cases,¹⁵² and must ensure that more than just qualifications and an opinion are offered at summary judgment (and any deposition prior thereto). The crucial link of competent, specific facts supporting the opinion must also be present.

A number of other important summary judgment decisions are highlighted below:

- (1) Argument or speculation is insufficient to resist summary judgment.¹⁵³
- (2) Where a summary judgment affidavit contains inadmissible material that is inextricably combined with the admissible portions, the court may disregard the entire affidavit.¹⁵⁴

151. *Id.* at 1345.

152. *See, e.g.,* *Mid-State Fertilizer v. Exchange Nat’l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989) (rejecting expert opinion unsupported by specific facts).

153. *Scherer v. Rockwell Int’l*, 975 F.2d 356, 361 (7th Cir. 1992) (“Argument is not evidence upon which to base a denial of summary judgment.”); *Karazanos v. Navistar Int’l Transp.*, 948 F.2d 332, 337 (7th Cir. 1991) (nonmovant cannot ward off summary judgment “with an affidavit or deposition based on rumor or conjecture”).

154. *Gonzales v. North Township*, 800 F. Supp. 676, 680 (N.D. Ind. 1992).

(3) Issues of fact cannot be created by contradicting prior sworn testimony.¹⁵⁵

(4) An affidavit that contained nothing more than conclusory legal arguments was properly excluded because merely attaching a jurat to a statement does not make it competent evidence for summary judgment.¹⁵⁶

(5) When a party moves for summary judgment against a pro se litigant, separate notice must be given to the nonmovant explaining the need to respond to the motion, including both the text of Federal Rule of Civil Procedure 56(e) and an explanation of the rule in ordinary English. Prior law in the Seventh Circuit had expressly required such notice only to pro se prisoners.¹⁵⁷

(6) The mere existence of a factual dispute is not sufficient to bar summary judgment; the disputed fact must be outcome determinative.¹⁵⁸

(7) Litigants continue to ignore local rules at summary judgment, and when they do, the facts stated by the nonmovant can be and often will continue to be taken as true, particularly in the Northern District of Illinois.¹⁵⁹

(8) A party that has not been diligent in discovery may not use Federal Rule of Civil Procedure 56(f) to gain additional time to conduct discovery to oppose summary judgment. Thus, when a plaintiff filed suit in December, 1990, and then did not depose the defendant or anyone else during the sixteen months preceding the defendant's motion for summary judgment, Judge Miller denied the plaintiff's motion under Rule 56(f) to conduct new discovery.¹⁶⁰

(9) Summary judgment cannot be granted on a basis not urged by the movant, and cannot be granted by surprise without opportunity to respond.¹⁶¹

X. TRIAL

One of the most perplexing issues for lawyers trying jury cases is the scope of the peremptory challenge, of which each party gets three

155. *Essick v. Yellow Freight Sys.*, 965 F.2d 334, 335 (7th Cir. 1992).

156. *Resolution Trust Corp. v. Juergens*, 965 F.2d 149, 152-53 (7th Cir. 1992).

157. *Timms v. Frank*, 953 F.2d 281, 283-86 (7th Cir. 1992).

158. *Allstate Ins. v. Norris*, 795 F. Supp 272, 274 (S.D. Ind. 1992).

159. *Schulz v. Serfilco, Ltd.*, 965 F.2d 516, 519 (7th Cir. 1992); *Wienco, Inc. v. Katahn Assocs.*, 965 F.2d 565, 567-68 (7th Cir. 1992).

160. *CBS v. Henkin*, 803 F. Supp. 1426, 1430-32 (N.D. Ind. 1992).

161. *Edwards v. Honeywell, Inc.*, 960 F.2d 673, 674 (7th Cir. 1992); *Peckmann v. Thompson*, 966 F.2d 295, 298 (7th Cir. 1992).

in a federal civil case.¹⁶² Since the Supreme Court's decisions in *Batson v. Kentucky*¹⁶³ and *Edmonson v. Leesville Concrete*,¹⁶⁴ the available uses of the peremptory challenge have diminished drastically, while at the same time uncertainty over the permissible uses continues. The change has been profound, particularly when one considers that as late as 1989, a civil trial lawyer in the Seventh Circuit could use a peremptory challenge for *any* reason, including race, gender, age, ethnicity, or disability. Indeed, those were often the types of characteristics that figured into a peremptory strike. The following summary outlines this important issue.

The first question is what type of prospective juror is protected. In the Seventh Circuit, the *Batson* prohibition against the use of peremptory challenges on the basis of race has applied since 1990.¹⁶⁵ This became the law of the land in 1991 in the Supreme Court's *Edmonson* decision. What has been unclear is the scope of the prohibition against race-based challenges (e.g., whether a white juror can be removed by a peremptory), and whether the *Batson* and *Edmonson* rules apply to protect members of other groups (e.g., the elderly or women) from peremptory challenges.

Some of the cases suggest that only members of a minority group are protected from such challenges. For instance, Judge Tinder stated in one opinion that "[i]t is the striking of a single black juror [or member of another racial minority] for racial reasons that invokes the shelter of the Equal Protection clause."¹⁶⁶ On the other hand, others use broader terms such as a "cognizable racial group."¹⁶⁷ And, in late 1992, the Louisiana Supreme Court held that a racially motivated peremptory challenge cannot be used by a black criminal defendant to exclude white jurors.¹⁶⁸

Neither the Supreme Court nor the Seventh Circuit has delineated the contours of race-based peremptories, although the Supreme Court's most recent opinion in *Georgia v. McCollum*¹⁶⁹ included broad language that "denying a person participation in jury service on account of . . .

162. 28 U.S.C. § 1870 (1988). When there are multiple plaintiffs or defendants, this statute provides, "Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly." *Id.*

163. 476 U.S. 79 (1986).

164. 111 S. Ct. 2077 (1991).

165. *Dunham v. Frank's Nursery & Crafts*, 919 F.2d 1281, 1288 (7th Cir. 1990).

166. *Cotton v. Basic*, 793 F. Supp. 191, 193 (S.D. Ind. 1992) (quoting *United States v. Ferguson*, 935 F.2d 862, 865 (7th Cir. 1991)) (bracketed language inserted by district court).

167. *Dunham*, 919 F.2d at 1283.

168. *Louisiana v. Knox*, 609 So. 2d 803, 806 (La. 1992).

169. 112 S. Ct. 2348 (1992).

race unconstitutionally discriminates against the excluded juror.”¹⁷⁰ The trend has been toward further restrictions on the use of peremptories, so until there is binding authority on the issue, practitioners should not exclude jurors of *any* race on the basis of their race.¹⁷¹

Beyond race-based inquiries, the courts are now dealing with gender-based peremptories. For instance, the Ninth Circuit has ruled in a criminal case that peremptory challenges cannot be based on gender.¹⁷² As this Article went to press, the Seventh Circuit had not addressed this issue. However, because district courts in this circuit are required to give most respectful consideration to decisions of other circuits and follow their decisions where appropriate,¹⁷³ practitioners in the Seventh Circuit should assume that gender-based peremptories are illegal.

Beyond race and gender, the scope of prohibited group-based peremptories remains unclear. Age, disability, religion, and other such characteristics are likely candidates for further expansion. Indeed, in *McCullum* the Supreme Court’s majority seemed to write with a broad pen, stating that if a court “allows jurors to be excluded because of *group bias*, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice—our citizens’ confidence in it.”¹⁷⁴

Again, caution is the watchword here, because certainly no trial lawyers want their judgments to be set aside based on an improper peremptory challenge. Thus, practitioners are advised to be particularly careful in striking members of “groups” defined by race, gender, age, religion, and disability, and ensure that there is a specific nondiscriminatory reason for the strike.

The second question is who can raise the issue. In 1990, the answer was that the complaining litigant had to be a member of the same group as the challenged juror.¹⁷⁵ This changed in 1991, when the Supreme Court made it clear in the criminal context, and subsequently applied it in the civil context, that *any* opponent can raise the issue, regardless of whether they are in the same group as the challenged juror.¹⁷⁶

170. *Id.* at 2353.

171. It seems amazing that this whole area, which purportedly is based on the Equal Protection Clause, could ever reach white jurors, at least under traditional equal protection analysis (suspect-class inquiries). Nonetheless, because the trend seems to be in that direction, caution must be the watchword. As Justice Thomas noted in his *McCullum* concurring opinion, the Supreme Court’s analysis has “no clear stopping point.” *Id.* at 2360 (Thomas, J., concurring).

172. *United States v. De Gross*, 960 F.2d 1433, 1438 (9th Cir. 1992) (en banc).

173. *See, e.g., Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987).

174. *McCullum*, 112 S. Ct. at 2354 (emphasis added).

175. *Dunham v. Frank’s Nursery & Crafts*, 919 F.2d 1281, 1283 (7th Cir. 1990).

176. *See Powers v. Ohio*, 111 S. Ct. 1364 (1991) (criminal); *Edmonson v. Leesville*

The third question is how the issue is raised, and what standards apply. To begin with, it should come as no surprise that—like any other trial-based error—the issue must be timely raised. Thus, where the issue was not raised until after the challenged jurors had been excluded and the jury had been sworn, the Ninth Circuit held that any claimed error had been waived.¹⁷⁷ Trial lawyers should thus raise any such objection at side-bar the moment the peremptory is used.

When such an objection is raised, the standards for addressing it are now quite clear:

First, the [objecting party] must make a *prima facie* showing that the [striking party] has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the [striking party] to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the [objecting party] has carried [its] burden of proving purposeful discrimination.¹⁷⁸

Although this approach was formulated in the criminal context, the Supreme Court has stated that the “same approach applies in the civil context.”¹⁷⁹

The first inquiry—whether the objecting party has shown a *prima facie* case of discriminatory striking—is satisfied “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.”¹⁸⁰ Such a vague, general standard is of little help in the abstract, but fortunately some case law provides further guidance. Judge *Tinder*, for instance, has explained that “the striking of a single black prospective juror *without more* is not sufficient to establish a *prima facie* case that the potential juror was struck for racial reasons.”¹⁸¹ Thus, where one black juror and one white juror were stricken, and where no other evidence suggested race played a part in the challenge to the black juror, Judge *Tinder* held that no *prima facie* case of discrimination

Concrete Co., 111 S. Ct. 2077, 2088 (1991) (civil). Note that each case specifically dealt with race-based challenges, with the specific holding of *Powers* being that one does not have to be a black to challenge the exclusion of a black juror. Assuming that other groups are, in fact, protected by *Edmonson* and its progeny, there is no reason to believe that a man, for instance, could not similarly object to a woman’s gender-based exclusion from a jury.

177. *Dias v. Sky Chefs, Inc.*, 948 F.2d 532, 534 (9th Cir. 1991).

178. *Dunham v. Frank’s Nursery & Crafts*, 967 F.2d 1121, 1123-24 (7th Cir. 1992) (quoting *United States v. Hernandez*, 111 S. Ct. 1859, 1866 (1991)).

179. *Edmonson*, 111 S. Ct. at 2089.

180. *Batson v. Kentucky*, 476 U.S. 79, 94 (1986).

181. *Cotton v. Busic*, 793 F. Supp. 191, 193 (S.D. Ind. 1992) (citing *Batson*, 476 U.S. at 96).

had been made.¹⁸² Similarly, the Seventh Circuit found no *prima facie* case of discrimination where two of four black members of the venire were stricken.¹⁸³ Thus, those raising a *Batson/Edmonson* objection must do so immediately, and must offer more than just the mere striking of a single prospective juror.

Assuming the *prima facie* case of discrimination is made, the burden shifts to the striking party, who must offer a neutral justification that is not “an obvious mask” for an improper challenge.¹⁸⁴ If the explanation survives this test, then it is for the trial court to determine whether the objecting party has proved purposeful discrimination.¹⁸⁵ This is a factual finding for the trial court, and one which will often turn purely on the striking attorney’s credibility.¹⁸⁶ For instance, in one case Judge Tinder believed defense counsel’s proffered reasons in a civil-rights case that the juror had been excluded because of his demeanor, his low-paying job, and his residence near the location of the underlying incident.¹⁸⁷

The case law in this area no doubt will continue to develop, and many questions will be resolved. In the meantime, however, trial lawyers should assume that *every* peremptory challenge they make will be objected to on *Batson/Edmonson* grounds, and should prepare nondiscriminatory reasons for their strikes at the time they are made.¹⁸⁸ Conversely, trial lawyers also should be on the watch for their opponents’ discriminatory challenges, particularly when the challenge concerns a juror thought to be ideal for the client’s case. If a challenge is arguably discriminatory, an immediate objection at side-bar should be made.

XI. MISCELLANEOUS

Finally, a number of developments occurred in various subjects that are best highlighted in this catch-all miscellaneous category:

(1) In a patent infringement case, copy costs of more than \$6,000 were denied to a prevailing party under Federal Rule of Civil Procedure 54(d) and 28 U.S.C. § 1920 because proof of the costs’ necessity was not shown.¹⁸⁹

(2) In one case, Judge Barker advised parties by written order that arguments should be made to the court by filing appropriate

182. *Id.* at 193.

183. *United States v. McAnderson*, 914 F.2d 934, 942 (7th Cir. 1990).

184. *Dunham v. Frank’s Nursery & Crafts*, 967 F.2d 1121, 1124 (7th Cir. 1992).

185. *Id.*

186. *Id.*

187. *Cotton v. Busic*, 793 F. Supp. 191, 194 (S.D. Ind. 1992).

188. Indeed, in at least one case, *Watson v. Amedco Steel*, IP88-1329-C, Judge Barker raised the issue *sua sponte*.

189. *Arachnid, Inc. v. Valley Recreation Prods.*, 143 F.R.D. 192 (N.D. Ill. 1992).

documents with the clerk, rather than by sending letters to the judge.¹⁹⁰

(3) The President signed the Incarcerated Witness Fees Act of 1991 into law, amending 28 U.S.C. § 1821 and making prisoners ineligible for witness attendance fees.¹⁹¹

(4) The Seventh Circuit reiterated the rule that federal courts applying state law are not bound by decisions of lower or intermediate courts, but instead are duty bound to follow or predict how that state's high court would rule.¹⁹²

(5) The Seventh Circuit commented in dictum that the state-law interpretation of a district judge who has sat on the forum's appellate bench is "entitled to some weight."¹⁹³

(6) Concerning certification of state-law issues to the forum-state's high court, the Seventh Circuit held that fact-specific, particularized decisions that lack broad, general significance are not suitable for certification,¹⁹⁴ but in another case held that state court cases that provide tangential guidance as to how a state's high court would rule do not, without more, preclude certification.¹⁹⁵

(7) Remittitur proved invaluable to Black and Decker and the City of Indianapolis. Black and Decker persuaded the Seventh Circuit to reduce a punitive damages award in a products liability case from \$10 million to \$5 million,¹⁹⁶ and several Indianapolis police officers persuaded Judge Barker to enter judgment as a matter of law on several claims and otherwise order remittitur of a \$1.5 million civil-rights verdict to \$78,000.¹⁹⁷

190. *O.K. Sand & Gravel v. Martin Marietta Corp.*, IP90-1051-C (S.D. Ind. July 23, 1992) (order directing filing of the letters).

191. Pub. L. No. 102-417, 106 Stat. 2138 (1992). This overrides the Supreme Court's decision in *Demarest v. Manspeaker*, 111 S. Ct. 599 (1991).

192. *Smith v. Navistar Int'l Transp.*, 957 F.2d 1439, 1443 (7th Cir. 1992); *Eljer Mfg. v. Liberty Mut. Ins.*, 972 F.2d 805, 814 (7th Cir. 1992).

193. *Atlanta Int'l Ins. v. Yellow Cab*, 972 F.2d 751, 752 (7th Cir. 1992). This is contrary to the holding and spirit of *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991), in which the Supreme Court held that federal courts of appeal are to review district judges' determinations of state law *de novo*, even if that district judge has experience on the state bench.

194. *Woodbridge Place Apartments v. Washington Square Capital*, 965 F.2d 1429, 1434 (7th Cir. 1992).

195. *Doe v. American Nat'l Red Cross*, 976 F.2d 372, 374 (7th Cir. 1992).

196. *Ross v. Black & Decker*, 977 F.2d 1178 (7th Cir. 1992).

197. *Sanders v. City of Indianapolis*, IP89-480-C (S.D. Ind. Dec. 24, 1992).

Finally, the Seventh Circuit Committee on Civility issued its final report and recommendations during 1992.¹⁹⁸ In general, the Committee found that a civility problem does exist within the Circuit, particularly in the larger metropolitan areas. The Committee recommended that the Seventh Circuit adopt the Committee's detailed proposed standards of civility, which are common-sense, nonbinding guidelines seeking to improve lawyers' relations with other counsel, lawyers' relations with the courts, and judges' relations with each other. Judge McKinney and Judge Aspen served on the four-year committee, and are thus quite familiar with the report and the proposed standards. In addition, the report and standards have been circulated to all judges in the circuit.

It is rumored that some judges expect these proposed standards to be followed. Indeed, a review of the standards shows that this is the stuff of many discovery disputes, sanctions motions, and other collateral issues that detract from the merits of a case. Practitioners are advised to spend a few minutes reviewing the final report and proposed standards.¹⁹⁹

198. INTERIM REPORT OF THE COMM. ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, 143 F.R.D. 371 (1992).

199. FINAL REPORT OF THE COMM. ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT, 143 F.R.D. 441 (1992).

Recent Constitutional Decisions in Indiana

PATRICK BAUDE*

Much has been written lately, in these law review pages¹ and elsewhere,² about the emergence of a new world order in American constitutional law. Although the grip of twelve years of conservative national politics has led the United States Supreme Court to abandon the expansive constitutional jurisprudence that marked the Warren and even Burger periods, state courts have shown a counterbalancing willingness to assume a more active role in protecting individual interests against governmental power. The introduction to last year's survey of constitutional developments noted that, "As the United States Supreme Court continues to narrow the scope of the federal constitution, there has been a movement across the country to explore state constitutions as a largely untapped source for the protection of individual liberty."³ To make sure that future lawyers in this state will not miss the new order, the Indiana Supreme Court has now added Indiana constitutional law to the required bar examination subjects.

There is, in other words, no shortage of rhetorical commitment. The striking fact is, however, that in 1992 no Indiana appellate court found any state statute to be unconstitutional. The only Indiana statute invalidated on constitutional grounds was struck down by the United States Court of Appeals for the Seventh Circuit.⁴ This is not to say that reliance on the Indiana Constitution is pointless or a sham. Certainly

* Professor of Law, Indiana University—Bloomington. A.B., 1964, University of Kansas; J.D., 1966, University of Kansas; LL.M., 1968, Harvard. Thanks to Marshall Derks for his help with research.

1. See Chief Justice Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

2. See generally Patrick Baude, *Is There Independent Life in the Indiana Constitution?*, 62 IND. L.J. 263 (1987); Symposium, *Emerging Issues in State Constitutional Law*, 65 TEMPLE L. REV. 1119 (1992).

3. Rosalie Berger Levinson, *State and Federal Constitutional Law Developments Affecting Indiana Law*, 25 IND. L. REV. 1129, 1129 (1992).

4. *Government Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), cert. denied, 113 U.S. 977 (1993). Following two recent Supreme Court decisions, the court of appeals found unconstitutional several Indiana statutes having the effect of restricting the importation of trash. What was mainly remarkable about the court's opinion was the ease with which it concluded that the legislation rested upon an impermissible protectionist motive, despite the absence of such factual findings in the record. See Comment, *Environmental Provincialism, the Commerce Clause, and Hazardous Waste: The High Court Hazards a Guess*, 27 WAKE FOREST L. REV. 949 (1992). The author was involved in drafting some parts of the legislation considered in *Government Suppliers*.

in some years the Indiana Supreme Court has found a state statute in violation of the state constitution.⁵ During the past year, the state courts have used state constitutional principles to justify both individual interpretations of statutes and other decisions in particular cases. In *Campbell v. Criterion Group*,⁶ for example, the Indiana Supreme Court held that an indigent civil appellant was entitled to a free transcript for appeal, based in part on the language of Article 7, Section 6, of the state constitution, which guarantees "an absolute right to one appeal."⁷ But the constitution was in the end used as a way of shaping and directing the common law and the court's own supervisory power. Similarly, the state courts last year used the state constitutional principle of proportionality recognized in *Clark v. State*⁸ to upset two criminal sentences.⁹

The larger point is that important developments in constitutional law are often, especially at first, more shifts in rhetoric than in power. *Marbury v. Madison*,¹⁰ after all, was mainly a rhetorical exercise in the beginning. The Court could have more easily reached the result by statutory construction, and the actual power it asserted was in fact not used for half a century.¹¹ Of course, much of the rhetoric of constitutional law is empty. Rising from my Lexis terminal preparing this Article, I began to wonder if any parent who did not get custody of his or her child had failed to argue that the constitution gives parents a right to live with their children;¹² if anybody who did not get all of the pieces of paper that he or she expected had neglected to argue that the due process clause requires notice;¹³ or if anybody who had a little trouble figuring out a statute overlooked the void-for-vagueness argument.¹⁴ The courts' decisions in these "constitutional law as a last resort" cases read like the words of patient parents and need no particular exploration.

5. See, e.g., *Brady v. State*, 575 N.E.2d 981 (Ind. 1991).

6. 605 N.E.2d 150 (Ind. 1992).

7. *Id.* at 158.

8. 561 N.E.2d 759 (Ind. 1990); see also, *Best v. State*, 566 N.E.2d 1027 (Ind. 1991).

9. *Saunders v. State*, 584 N.E.2d 1087 (Ind. 1992); *Wilson v. State*, 583 N.E.2d 742 (Ind. 1992).

10. 5 U.S. (1 Cranch) 137 (1803).

11. That is, no federal statute was invalidated by the Supreme Court until *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

12. E.g., *In re A.M. and E.M.*, 596 N.E.2d 236 (Ind. Ct. App. 1992); *Lamb v. Wenning*, 591 N.E.2d 1031 (Ind. Ct. App. 1992).

13. E.g., *Elizondo v. Read*, 588 N.E.2d 501 (Ind. 1992); *Bratton v. MGK, Inc.*, 587 N.E.2d 134 (Ind. Ct. App. 1992).

14. E.g., *Garrod v. Garrod*, 590 N.E.2d 163 (Ind. Ct. App. 1992); *State v. Springer*, 585 N.E.2d 27 (Ind. Ct. App. 1992).

There were, however, three lines of cases that do reveal some significant points.

I. FIGHTING WORDS

In traditional free speech analysis, the United States Supreme Court has upheld two different sorts of governmental regulations of speech. First, the Court has simply placed some kinds of speech beyond the bounds of the First Amendment to the United States Constitution. In an earlier generation, these excluded categories were defamation, commercial speech, obscenity, and fighting words. Since the 1960s, both defamation and commercial speech have been brought within the protection of the First Amendment to the Federal Constitution. Obscenity, on the other hand, has been firmly placed outside the protection of the First Amendment, and also outside the protection of Article 9, Section 1 of the Indiana Constitution.¹⁵ It is unclear whether fighting words will remain completely unprotected or whether they will come to be given a context-sensitive status like that of defamation. Second, even if speech is “within” the bounds of protected expression, the government can regulate it in ways that stop short of total prohibition. So, if fighting words are in the first category, there is a constitutional open season on those who use them. If they are in the second category, their regulation must be measured by some constitutional standard, something like reasonableness and content-neutrality, variously phrased. Since one of the hottest political and philosophical issues of free speech today is “hate speech” — insults and taunts driven by racial or similar animus — and since the categories of fighting words and hate speech often overlap, the courts have often revisited this subject.

In *R.A.V. v. City of St. Paul*,¹⁶ an important case from Minnesota, the United States Supreme Court discussed the issue of fighting words without resolving some of the questions which Indiana’s courts will now have to face. In *R.A.V.*, a St. Paul city ordinance banned symbols which aroused “anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”¹⁷ The entire Court agreed that the law was unconstitutional. Four Justices would have limited their holding to the observation that this ordinance prohibited more than fighting words: fighting words are, roughly, “face-to-face insults meant to and likely to provoke fisticuffs.”¹⁸ Because the ordinance clearly

15. *Fordyce v. State*, 569 N.E.2d 357, 359-62 (Ind. Ct. App. 1991).

16. 112 S. Ct. 2538 (1992).

17. *Id.* at 2541.

18. Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 127 n.23 (1992). Actually, the word “fisticuffs” does seem to convey the quaintly dated concept of the idea. An AK-47 seems more likely on a contemporary street.

prohibited symbols leading to “resentment” rather than just violence, to psychic pain as well as suffering, it could not be upheld under the “fighting words” doctrine. If the Court had stopped with these four Justices, there would have been no reason to rethink the doctrine. As it had done on every other occasion in the last fifty years, the Court would have asserted that there was such an abstract possibility as “fighting words,” but that these particular words did not fall within that theoretical clarity. Yet five other Justices *were* prepared to assume that the ordinance was limited to fighting words. Under the previous understanding of the fighting words doctrine, that should have meant that they were, like obscenity, unprotected — end of case. But these Justices, in a majority opinion by Justice Scalia, held that fighting words could constitutionally be prohibited only if the prohibition were neutral with respect to content.¹⁹ Under the St. Paul ordinance, for example, calling someone a “fascist running dog” would not be an offense, but calling him a “Christian son of a bitch” would be likely to provoke resentment “on the basis of religion”²⁰ and perhaps gender. Accordingly, for the majority, the proscription of fighting words was not content-neutral and therefore unconstitutional.²¹ However exactly we might phrase this conclusion, there seems to be no denying that fighting words currently are not completely beyond the First Amendment’s pale.

In Indiana, the typical fighting words cases have involved language directed at police officers. The reasons why this scenario is so common are not hard to imagine. Prudence alone would suggest that someone bent on vituperation should not seek out police officers to ventilate his vocabulary of insults. Many people who are taunted and abused simply look away. Police officers are trained (and perhaps even predisposed) otherwise. A typical case in the Survey period is *Robinson v. State*.²² Officer Mills went to investigate Robinson’s activities in a parking lot. Robinson told Mills to “get the fuck away,” called him a “lying mother-fucker,” and categorized the investigation as “bullshit.”²³ Judge Buchanan found these words to be fighting words because:

[t]hey skirt the depths of degradation despite the fact they may be tolerated or in common usage by a certain element of our society. Unfortunately, there is an element of our society that regularly engages in criminal conduct, hardly an excuse for others

19. *R.A.V.*, 112 S. Ct. at 2547.

20. *Id.* at 2548.

21. *Id.*

22. 588 N.E.2d 533 (Ind. Ct. App. 1992).

23. *Id.* at 534.

to do likewise. This does not justify tolerance of such depravity by a police officer or any other citizen.²⁴

Judge Shields dissented, relying in part on an exegesis of the word "motherfucker."²⁵ She observed that a contemporary dictionary definition of the word renders it as "a mean, despicable or vicious person."²⁶ She pointed out that the court of appeals had previously found the epithet "asshole" to be protected by the First Amendment,²⁷ and that that word's dictionary definition (as an epithet) was "a stupid, mean, or contemptible person."²⁸ Because the meaning of the terms was so close, it followed to Judge Shields that the term "motherfucker" could not be excised from the vocabulary that citizens might use in discussions with government officials.²⁹ One of the deeper problems with the fighting words doctrine certainly is the difficulty of dealing with these matters of degree. To Judge Shields, the critical point was not the coarseness of Robinson's language, but rather his intent. He had not intended to provoke a fight. However rudely, he was asking Officer Mills to leave, not to fight. Judge Shields' position is consistent with the logic of the fighting words doctrine. Even a very polite phrase, such as, "Excuse me, you'd better draw your knife as I intend to cut your ear off," could start a fight more readily than Robinson's "Get the fuck away," which provides explicit directions on how a confrontation could be avoided.

*Gamble v. State*³⁰ is a similar case. When Mr. Gamble was arrested, he screamed, among other things, that he was going to "kill that f— g pig"³¹ when he got out of jail. The court of appeals affirmed his conviction.³² Here Judge Shields concurred in result, without explanation.³³ Her concurrence follows from the logic of her earlier concurrence in *Robinson*. Gamble's words were not merely foul, they also threatened violence. Both *Gamble* and *Robinson* rely, in large part, on a background of Indiana cases expressing the view that police officers need not be required to tolerate severe insult as a condition of their conversations

24. *Id.* at 535.

25. *Id.* at 536-37.

26. *Id.* at 536.

27. *Id.* See *Cavazos v. State*, 455 N.E.2d 618 (Ind. Ct. App. 1983).

28. *Id.*

29. *Id.*

30. 591 N.E.2d 142 (Ind. Ct. App. 1992).

31. *Id.* at 144. The delicacy in spelling the "F"-word appears to be on the part of the court reporter at the trial, not a heightened standard of censorship in the court of appeals.

32. *Id.*

33. *Id.* at 146.

with citizens. A recent case in which the police arrested the defendant for her language to police officers after they had responded to her call for help in a domestic disturbance illustrates a typical statement of that position:

While not every abusive epithet directed toward a police officer would justify a conviction for disorderly conduct, we find no sound reason to subject police officers to the abuse suffered . . . here [she called them each a "son-of-a-bitch" and a "fucker"], which we find to be beyond that which any person might reasonably be expected to endure.³⁴

If these were the only cases in the last year, they would seem to set Indiana on a collision course with the United States Supreme Court's new hostility to the fighting words doctrine. First, the language in these cases is not all that terrible. Of course, these are questions of taste and degree, and I don't mean to suggest that I find it an attractive vision to live in a world in which people constantly shout out epithets that require appellate judges to write little essays comparing "asshole" with "motherfucker." Still, the essence of the fighting words doctrine is fighting, not taste and wit. Show me a man who goes ballistic every time that he hears the F-word, and I will show you a case of terminal exhaustion. Second, the rationale of the fighting words doctrine is that society can intervene to stop the fight by stopping the insult. But society can also train its police officers to pity the limited vocabulary of the citizens with whom they deal rather than beating up those citizens. Show me a municipality that hires officers who beat people up when they get insulted, and I'll show you what a high insurance premium looks like—and some cops who are unwelcome at the F.O.P.'s weekly card game. But third, and most significantly, these cases seem to suggest, although they do not say so outright, that some degree of circumspection is required when discussing one's situation with a police officer. Now as common sense, that is extremely advisable. A good rule to live by is never to call an armed man a motherfucker. As a legal principle, however, it seems close to the edge of *R.A.V.*

A third case from the court of appeals, *Price v. State*,³⁵ takes a completely different approach, explicitly rejecting *Robinson* and *Gamble*. In an opinion of great depth and scholarship, Judge Sullivan surveyed cases from around the country, the commentary to the Model Penal Code (after which the Indiana disorderly conduct statute is patterned), and the legislative history of the Indiana statute, concluding:

34. *Brittain v. State*, 565 N.E.2d 757, 761 (Ind. Ct. App. 1991).

35. 600 N.E.2d 103 (Ind. Ct. App. 1992).

Without reservation we agree that law enforcement officers should not be subjected to undue verbal abuse. However, it is also true that the training of a police officer includes an emphasis upon objectivity, calm and self-control. Police are trained to be a part of the solution to a particular disruptive problem rather than a contributing factor to the problem. . . . In any event, the disorderly conduct statute was never intended to prevent mere protests against police officers, and could not be construed to do so.³⁶

The court upheld the defendant's conviction, not out of sensitivity to the working conditions of police officers, but because the evidence showed that she had intended to cause a loud disturbance.³⁷ The defendant specifically argued that the Indiana statute had been applied unconstitutionally because it was used mainly to arrest those who protested to the police. It seems clear that this argument is theoretically valid under *R.A.V.* Before the Supreme Court's decision in that case, it might have been said that, since fighting words were outside the First Amendment, the state could punish their use in any subcategory it chose, such as fighting words that aroused resentment on the basis of law enforcement status. After *R.A.V.*, such a prohibition would be unconstitutional because it is not content-neutral. Judge Sullivan's opinion rejected the defendant's argument on the factual ground that there was no "cognizable evidence in this case to support that assertion."³⁸ In another section of its opinion, discussed below, the court concluded that the Indiana constitutional guarantees of free expression also exempt fighting words.

II. RATIONAL BASIS

In the structure of modern constitutional law, almost every area seems to be governed by a two-tiered test, even though the term "tier" is primarily used for equal protection analysis. Thus, a content-specific regulation of speech must be justified by some governmental interest on the order of preventing an imminent and substantial harm, a governmental invasion of privacy must be justified by a compelling interest, a warrantless search must be justified by exigent circumstances, discrimination against a suspect class must be necessary as a means to a compelling interest, and so on. On the other hand, less suspect intrusions need only

36. *Id.* at 112. Judge Hoffman joined in Judge Sullivan's opinion, and Judge Shields, who had dissented in *Robinson*, concurred separately expressing some reservations about the interpretation of the disorderly conduct statute.

37. *Id.* at 115.

38. *Id.*

meet a lower standard of justification, usually expressed with the word "reasonable." So a regulation of the time, place, and manner of speech (rather than of its content) need only be reasonable, or a nonsuspect distinction between two classes (say, acquitted defendants and defendants against whom the prosecutor dropped charges³⁹) need rest only on a rational basis. There are two ways to increase the constitutional protection of an activity or class. One is to classify the activity as a constitutional "right" or to recognize the class as "suspect." There were no developments of this kind in Indiana during the Survey period. Certainly there were cases involving explicit constitutional rights⁴⁰ or suspect classes,⁴¹ but none of them broke new ground. The second way to extend constitutional protection is to subtly shift the application of the reasonableness test. Here, the situation is less clear.

It is familiar ground that a statute will be upheld as "rational" on a fairly flimsy showing that a sane person might have believed that the statute could somehow be sensible. Thus, the United States Supreme Court has held that New Orleans may prefer existing sandwich vendors to new competitors on the ground that the existing vendors might contribute historical flavor to the neighborhood,⁴² or that Oklahoma may prohibit opticians from putting duplicate lenses in old eye-glass frames because of some imagined health hazard.⁴³ Yet careful observers have often noted that courts sometimes use the same test to strike down statutes which seem no more implausible than these examples.⁴⁴ By the same token, one of the ways in which state courts might acquire a

39. *Kleiman v. State*, 590 N.E.2d 660 (Ind. Ct. App. 1992).

40. *E.g.*, *Henrichs v. Pivarnik*, 588 N.E.2d 537 (Ind. Ct. App. 1992) (illustrating what a public figure must show to overcome the burden of proving actual malice); *Albro v. Indianapolis Educ. Ass'n*, 585 N.E.2d 666 (Ind. Ct. App. 1992) and *Fort Wayne Educ. Ass'n v. Aldrich*, 585 N.E.2d 6 (Ind. Ct. App. 1992) (illuminating discussions by Judges Shields and Staton, respectively, of how a union should calculate its fees to avoid impinging on members' rights not to support political causes other than their own).

41. *E.g.*, *Morse v. State*, 593 N.E.2d 194, 196 (Ind. 1992) (holding that defendant failed to make out a prima facie case of purposeful discrimination where prosecutor peremptorily struck only African-American venireman but there was no other evidence of discriminatory intent); *Nicks v. State*, 598 N.E.2d 520 (Ind. 1992) (finding that prosecutor rebutted prima facie case of discriminatory use of peremptory challenges, assuming for the sake of the argument both that there was a prima facie case of racial discrimination and that the same standard applied to gender discrimination); *Parents of M.L.V. v. Wilkens*, 598 N.E.2d 1054 (Ind. 1992) (upholding different treatment of mothers and putative fathers in adoption proceedings).

42. *New Orleans v. Dukes*, 427 U.S. 297 (1976).

43. *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

44. See generally Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

distinctive voice in constitutional law is by applying this higher standard of rationality to some subset of issues.⁴⁵

Certainly there are many typical Indiana cases during the survey period that illustrate the deference implicit in the usual application of the rational basis test. In *Kleiman v. State*,⁴⁶ for example, an acquitted defendant challenged the Indiana statute that permits arrested persons to seek expungement of their records if the charges are dropped in some circumstances, but which never permits expungement for a defendant who was tried and acquitted. The court held that there was a rational basis for this distinction because there must have been probable cause to try the defendant who was acquitted.⁴⁷ In *Babcock v. Lafayette Home Hospital*,⁴⁸ the court upheld the shorter statute of limitations applying to medical malpractice claims against an equal protection challenge.⁴⁹ As the court put it, in the traditional and familiar application, "[a]lthough IC 16-9.5-3-1 may provide harsh results in some instances, the distinction it draws bears a rational relationship to legitimate state interests."⁵⁰

But then there is *Indiana High School Athletic Ass'n v. Schafer*.⁵¹ Schafer, a basketball player who became ill during the school year, was allowed to repeat the academic year in accordance with a bona fide academic policy of his school. As a result of a complicated application of an Indiana High School Athletic Association rule, he lost athletic eligibility. The court was prepared to recognize that the rule was rationally related to a legitimate state interest, designed as it was to protect academic work from the erosion of high-pressure athletic competition. On the other hand, the rule was not a particularly intelligent way to resolve Schafer's life because his scholastic delay was the product of illness. In *Sturrup v. Mahan*,⁵² the Indiana Supreme Court had struck down high school athletic association rules that were reasonable but "sweep too broadly in their proscription and, hence, violate the Equal Protection Clause."⁵³ Striking the rule down in *Schafer*, the court of appeals regarded itself bound to follow *Sturrup* even though it did not apprehend either

45. See generally Monrad G. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 92 (1950).

46. 590 N.E.2d 660 (Ind. Ct. App. 1992).

47. *Id.* at 663.

48. 587 N.E.2d 1320 (Ind. Ct. App. 1992).

49. *Id.* at 1325.

50. *Id.* at 1325-26.

51. 598 N.E.2d 540 (Ind. Ct. App. 1992).

52. 305 N.E.2d 877 (Ind. 1974).

53. *Id.* at 881. If the court meant to limit its holding to the Equal Protection Clause of the Fourteenth Amendment, the decision's principle is not likely to survive review by the United States Supreme Court. The decision could, however, be easily recast as an interpretation of the Indiana constitution. See *infra* note 61.

the rationale or the "constitutional implications" of the decision.⁵⁴ A federal district court in the northern district of Indiana has since regarded itself as similarly bound, relying in part on *Schafer*.⁵⁵ In effect, then, there is a sub-rule in Indiana: even when there is no identifiable rationale for heightened scrutiny, an overbroad rule can be struck down if it falls within the force field of *Sturup*. But when does the *Sturup* overbreadth rule apply? I can think of three rationales: (1) perhaps the IHSAA, although "state action," is not the sort of deliberative governmental body to which the ordinary standard of deference is appropriate; (2) perhaps the fact that those limited by the rules (athletes) have had absolutely no right to participate in their formation or to recall those who made the rules, removes this case from the ordinary argument that an election is the best cure for an irrational law; or (3) this is Indiana and basketball is a constitutional entitlement.⁵⁶ In any case, the possible analogy to *Sturup* remains as a last resort for any rational basis argument.

III. THE STATE CONSTITUTION

The courts decided a number of cases specifically interpreting the Indiana Constitution. Most of these were straightforward. The Indiana Supreme Court rejected the argument that the contract clause forbids the legislature from shortening the period of redemption from a tax sale.⁵⁷ Applying principles of separation of powers and functions, the court of appeals held that a trial court could not function as the prosecution in a probation revocation proceeding.⁵⁸ There were, in addition, a number of cases involving punishment and sentencing, more readily discussed in the context of criminal law than constitutional law.

There were, however, two state constitutional law cases of great interest. First was *State v. Rendleman*.⁵⁹ Rendleman collided with a highway patrol car. Under the Indiana Tort Claims Act, the state denied liability in connection with law enforcement. Rendleman argued that the law enforcement immunity violated Article I, Section 12, of the Indiana Constitution of 1851, which provides that "every person, for injury

54. 598 N.E.2d at 553.

55. *Jordan v. Indiana High Sch. Athletic Ass'n, Inc.*, No. 92-295, 1993 U.S. Dist. LEXIS 879 (N.D. Ind. Jan. 27, 1993); see also *Crane v. Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315 (7th Cir. 1992) (relying on a pendent state law claim in order to avoid a constitutional challenge to another IHSAA eligibility rule).

56. But see *Crane*, 975 F.2d at 1315, which only involved golf.

57. *Metro Holding Co. v. Mitchell*, 589 N.E.2d 217 (Ind. 1992). There doesn't seem to be any authority to the contrary in this century.

58. *Isaac v. State*, 590 N.E.2d 606 (Ind. Ct. App. 1992).

59. 603 N.E.2d 1333 (Ind. 1992).

done to him in his person, property, or reputation, shall have remedy by due course of law.” The court analyzed the issue in historical sequence. In 1851, it was clear that there would have been no remedy in the Indiana courts, primarily because of the common law principle of sovereign immunity. In the 1960s, the court began to recognize actions against the sovereign, in effect modifying the common law. Then the legislature, in the Tort Claims Act, overrode the developing common law by creating a specific statutory scheme that immunized law enforcement activities from tort liability. If the events are described in this historical sequence, it seems clear that the constitution does not impose tort liability. But the issues could have been described in logical order rather than historical sequence, thus:

Major premise: The courts should enforce the general principles of law so as to assure remedies for those who suffer what the law generally regards as an injury.

Minor premise: The courts are charged with articulation of what general principles of law are, for otherwise Article I, Section 12, would not constrain the legislature. (“Effectuating this mandate requires that we manage Indiana’s common law, not as a frozen mold of ancient ideas, but as a dynamic force which keeps pace with progress.”⁶⁰)

Conclusion: Unclear, but at least it would not necessarily follow that Rendleman loses without discussion of what the law should be.

The court’s analysis, then, seems to reject the possibility of the constitution as a “living document” embracing evolving principles whose specific application depends upon context.

What the *Rendleman* case raises more deeply are questions about the first principles of the state constitution. Federal constitutional law is the product of a continuing dialogue about the nature of authority, the relevance of history, the relevance of enlightened morality, the proper place for a countermajoritarian institution in a democratic system, the interpretation of texts, the role of public policy in fundamental law and many other such debates. The state constitution will have a life of its own only when we sort through the same questions and perhaps answer them differently.

What remains striking about the Indiana courts is that their interpretation of the state constitution seems so narrowly to parallel the federal, even when the language and history of the two documents are so different. There are still, for example, references to the Equal Pro-

60. Campbell v. Criterion Group, 605 N.E.2d 150, 156 (Ind. 1992).

tection Clause of the state constitution⁶¹ despite the fact that there isn't one. In many ways, the most dramatic way to see this limiting parallelism is to go back to the problem of fighting words and to the court of appeals' complete and careful opinion in *Price v. State*.⁶² Price argued that fighting words were within the protection of Article I, Section 9, of the Indiana Constitution, which provides:

No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible.

One who just read the language of this provision might well conclude that the Indiana framers meant only to prohibit prior restraints ("for the abuse of that right, every person shall be responsible.") Or that no "subject" matter was outside the pale. One who studied the history of those hardy frontiersmen would probably not find that they especially valued elegant and refined discourse. In construing the Oregon Constitution, written six years after and copied in this and many other particulars from Indiana's, that state's supreme court described its framers as "irreverent" and "rugged and robust."⁶³ As a result, the Oregon Supreme Court rejected the view that obscenity and fighting words were exempted from the state constitution.⁶⁴ Of course the Indiana Court of Appeals has plausible reasons to reject Oregon's interpretation, not the least compelling of which are explicit contrary holdings of the Indiana Supreme Court. But in the end, if state constitutionalism is to be anything more than a few politically motivated deviations from an occasional United States Supreme Court decision that happens to be unpopular with some lower court judges, Indiana needs its own dialogue about what it is as a place, about the history and shape of its institutions.

But as the Oregon experience demonstrates, once it becomes clear that a state's highest court is serious about the primacy and independence of the state constitution, lawyers and lower courts will begin to participate vigorously in the development of a rich and useful discourse.⁶⁵

61. See the very careful analysis by Judge Barteau in *Schafer*, 598 N.E.2d at 554 n.9. See Baude, *supra* note 2, at 270-71.

62. 600 N.E.2d 103 (Ind. Ct. App. 1992). See *supra* notes 34-37 and accompanying text.

63. *State v. Henry*, 732 P.2d 9, 16 (Or. 1987).

64. *Id.* at 17.

65. David Schuman, *Correspondence: A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 276-77 (1992).

The courts have raised the subject in Indiana. Perhaps if we can set aside the habit of allowing the United States Supreme Court to set the agenda, we can carry on the discourse which will constitute our state's political community.

Recent Developments in the Termination of School Desegregation Decrees

KEVIN BROWN*

INTRODUCTION

The remedial duty and responsibility imposed on a once segregated school district by the United States Supreme Court's opinions in *Brown v. Board of Education*¹ and its progeny is to take all steps necessary to eliminate the vestiges of the unconstitutional de jure segregation system. In the last two terms, the Supreme Court handed down its most significant opinions involving de jure segregation of public elementary and secondary education in over a decade.² In *Board of Education v. Dowell*³ and *Freeman v. Pitts*,⁴ the Court addressed issues related to what a school district must establish in order to demonstrate that it has eliminated those vestiges in whole or in part. This Article discusses what the Supreme Court has decided regarding when a local school district has discharged its affirmative obligation to eliminate the vestiges of all or part of its prior discriminatory conduct. This Article also discusses the implications of those cases for the Indianapolis Public School (IPS) desegregation case, and will highlight issues that must be addressed to determine if all or part of federal court supervision of the IPS system can be terminated.

I. BOARD OF EDUCATION V. DOWELL

In *Dowell*, the Supreme Court faced its first opportunity to address issues related to the termination of a school desegregation decree. The Oklahoma City school desegregation case commenced in 1961 with the

* Associate Professor of Law, Indiana University School of Law. B.S., 1978, Indiana University; J.D., 1982, Yale University School of Law. The author would like to thank Cheryl Peebles for her exceptionally fine research assistance and Kyrstie Herndon for exceptional secretarial assistance.

1. 347 U.S. 483 (1954).

2. In June of 1992, the Court also rendered an opinion in the case of *United States v. Fordice*, 112 S. Ct. 2727 (1992). In this opinion, the Court enunciated the standards to apply when addressing whether the affirmative obligation to dismantle a prior de jure segregated school system has been met in the university context. This opinion, however, is outside the scope of this Article which is confined to de jure segregation in elementary and secondary schools.

3. 111 S. Ct. 630 (1991).

4. 112 S. Ct. 1430 (1992).

filing of a complaint by African-American students and their parents against the Board of Education of Oklahoma City.⁵ In the ensuing years, the parties struggled through the difficult task of formulating a desegregation plan. This process culminated in 1972, with the district court imposing a desegregation plan known as the "Finger Plan."⁶ In 1977, having found that the Finger Plan achieved the court's objectives and that the school system was therefore "unitary," the district court terminated supervision of the case.⁷ Although the Board's motion was contested, the district court's order was not appealed.⁸ The Board,

5. *Dowell*, 111 S. Ct. at 633. In 1963, the district court found that Oklahoma City was operating a dual school system and had segregated schools intentionally in the past. *Id.* (citing *Dowell v. School Bd.*, 219 F. Supp. 427 (W.D. Okla. 1963)).

6. In 1972, the district court ordered the Board to adopt a desegregation plan known as the "Finger Plan." Under the Finger Plan, kindergartners would be assigned to neighborhood schools unless their parents wished otherwise. Children in grades one to four would attend formerly all white schools. Children in grade five would attend formerly all black schools. Thus, the African-American children were to be transported from grades one through four, with the white children transported only for grade five. Students in the upper grades would be bussed to various areas to maintain integrated schools. In integrated neighborhoods, there would be stand alone schools for all grades. *Id.* (citing *Dowell v. Board of Educ.*, 338 F. Supp. 1256, *aff'd*, 465 F.2d 1012 (10th Cir.), *cert. denied*, 409 U.S. 1041 (1972)).

7. *Id.* at 634. The Supreme Court noted that the meaning of the word "unitary," as used by the district court, was unclear. *Id.* at 635. The Court also noted that lower courts had been inconsistent with their use of the term "unitary." *Id.* "Some have used it to identify a school district that has completely remedied all vestiges of past discrimination," and therefore accomplished their constitutional obligation. *Id.*; *see, e.g.*, *United States v. Overton*, 834 F.2d 1171, 1175 (5th Cir. 1987); *Riddick v. School Bd.*, 784 F.2d 521, 533-34 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986); *Vaughns v. Board of Educ.*, 758 F.2d 983, 988 (4th Cir. 1985).

Other courts, however, have used "unitary" to describe any school district that has currently desegregated student assignments, whether or not that status is solely the result of a court-imposed desegregation plan. . . . [S]uch a school district could be called unitary and nevertheless still contain vestiges of past discrimination.

Dowell, 111 S. Ct. at 635 (citing *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985)). The Court stated that it was not sure that it was useful "to define these terms more precisely, or to create subclasses within them." *Id.* at 636. The Court found that "[t]he District Court's 1977 order [was] unclear with respect to what it meant by unitary and the necessary result of that finding." *Id.* This contradicted the Court's holding in *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 438-39 (1976), which required a precise statement to the school board of its obligations under a desegregation decree. *See also Freeman v. Pitts*, 112 S. Ct. 1430, 1443-44 (1992) (advising caution with regard to the use of the term "unitary").

8. After the Finger Plan was implemented, the Board of Education moved to close the case in June 1975 on the ground that it had eliminated all vestiges of state imposed racial discrimination in its school system and that it was operating a unitary

however, continued to operate under the Finger Plan until 1984.

In 1984, the Board of Education adopted a student reassignment plan (SRP) which was to begin in the 1985-86 school year. Unlike the Finger Plan, the SRP relied solely upon neighborhood school assignments for students in grades kindergarten through four. The Board argued that demographic changes made the increased distance that young African-Americans were bussed under the Finger Plan too burdensome. In addition, the Board asserted its desire to increase parental involvement in the schools. The Board felt that parental involvement was necessary for quality education and that neighborhood school assignments would increase such involvement.⁹ The result of the SRP, however, was to increase significantly the racial imbalance of students in the school system's elementary schools.¹⁰ In February, 1985, the plaintiffs sought to reopen the case.¹¹

school system. The district court held in its unpublished "Order Terminating Case":

The Court has concluded that [the Finger Plan] worked and that substantial compliance with the constitutional requirements has been achieved. The School Board under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before this court. . . .

Dowell, 111 S. Ct. at 633-34 (quoting No. Civ-9452, App. 174-76 (W.D. Okla. Jan. 18, 1977)).

9. When the Board adopted its new plan, it was convinced that parental involvement was essential to student academic achievement and quality education. In 1969, there were 95 parent-teacher associations in the Oklahoma City School District with a total membership of 26,528. When the Board implemented the SRP, there were only 15 PTAs with a total membership of 1,377. After the SRP had been in operation for just two years, the number of PTA organizations had increased by 200% and membership had increased by 144%. Open house attendance was up 5,167, and 3,745 more parents attended parent/teacher conferences in 1986-87 than in the year preceding the implementation of the SRP. *Dowell v. Board of Educ.*, 677 F. Supp. 1503, 1516-17 (W.D. Okla. 1987).

10. Under the SRP, at least 96.9% of the students in 11 of the 64 elementary schools were black and "44% of all Afro-American children in grades K-4 were assigned to these schools." *Dowell*, 111 S. Ct. at 641 (Marshall, J., dissenting). At least 90% of the students in 22 other schools were non-African-Americans. The remaining 31 schools were racially mixed. *Id.* The SRP did not affect faculty and staff integration. *Id.* at 634.

11. *Id.* at 641. The district court concluded that the principles of res judicata and collateral estoppel prohibited the plaintiffs from challenging the district court's 1977 findings that the school system was "unitary." *Dowell v. Board of Educ.*, 606 F. Supp. 1548, 1555 (W.D. Okla. 1985). Because unitariness had been achieved, the district court concluded that court-ordered desegregation should come to an end. The Tenth Circuit reversed. 795 F.2d 1516 (10th Cir.), cert. den., 479 U.S. 938 (1986). It held that nothing in the 1977 order indicated that the 1972 injunction itself was terminated, even though the order's unitary finding was binding upon the parties. The Tenth Circuit reasoned that the finding that the system was "unitary" merely ended the district court's active supervision of the

The district court eventually found that demographic changes made the Finger Plan unworkable and that the school district had bussed students for more than a decade in good-faith compliance with the court's orders.¹² The district court also found that the Board had done nothing for twenty-five years to promote residential segregation, and that the present residential segregation in Oklahoma City was the result of private decision making and economics. It was, therefore, too attenuated to be a vestige of former school segregation.¹³ The district court went on to hold that the previous injunctive decree should be vacated and the school district returned completely to local control.¹⁴

The Tenth Circuit reversed, writing that "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate."¹⁵ The Tenth Circuit approached the case "not so much as one dealing with desegregation, but as one dealing with the proper application of the federal law on injunctive remedies."¹⁶ Relying on *United States v. Swift & Co.*,¹⁷ the Tenth Circuit held that a desegregation decree remains in effect until a school district can show "grievous wrong evoked by new and unforeseen conditions"¹⁸ and "dramatic changes in conditions unforeseen at the time of the decree that . . . impose extreme and unexpectedly oppressive hardships on the obligor."¹⁹ The Tenth Circuit held that the Board of Education failed to meet this burden; therefore, the desegregation decree remained in effect.²⁰

In the majority opinion written by Chief Justice Rehnquist, the Supreme Court held that the Tenth Circuit's reliance on *Swift* was mistaken.²¹ The Court noted that the test espoused by the Tenth Circuit

case. Because the school district was still subject to the desegregation decree, the respondents could challenge the SRP. The case was remanded to the district court to determine if the desegregation decree should be lifted or modified. 795 F.2d at 1522-23.

12. *Dowell v. Board of Educ.*, 677 F. Supp. 1503, 1512-13 (W.D. Okla. 1987).

13. *Id.*

14. *Id.* at 1526.

15. *Dowell v. Board of Educ.*, 890 F.2d 1483, 1490 (10th Cir. 1989) (quoting Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1105 (1986)).

16. *Id.* at 1486.

17. 286 U.S. 106 (1932).

18. *Dowell*, 890 F.2d at 1490 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 109 (1932)).

19. *Id.* (quoting Timothy S. Jost, *From Swift to Stotts and Beyond: Modification of Injunctions in the Federal Courts*, 64 TEX. L. REV. 1101, 1110 (1986)).

20. *Id.* at 1505-06.

21. *Board of Educ. v. Dowell*, 111 S. Ct. 630, 636-37 (1991). Justice Marshall wrote a vigorous dissent in which Justices Stevens and Blackmun joined. For a discussion of Justice Marshall's dissent, see *infra* notes 93-98 and accompanying text.

would subject a school district to judicial tutelage for an indefinite future. Such an extreme result could not be justified by the principles governing the entry and dissolution of injunctive decrees, nor the commands of the Equal Protection Clause. The Court emphasized that a school desegregation decree is warranted only as a temporary measure intended to displace local decision making authority until transition to a unitary nonracial system of public education is achieved:

[A] finding by the District Court that the Oklahoma City School District was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the *school board* would return to its former ways, would be a finding that the purposes of the desegregation litigation had been fully achieved.²²

The Court also indicated that a desegregation decree should be dissolved after the local authorities have operated in compliance with it for a reasonable period of time.²³

The Court remanded the case to the district court, with instructions for the district court to determine:

whether the Board made a sufficient showing of constitutional compliance as of 1985, when the SRP was adopted, to allow the injunction to be dissolved. The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.²⁴

To provide further direction on what factors lower courts should consider in determining whether a school system has eliminated the vestiges of de jure segregation as far as practicable, the Supreme Court cited its 1968 opinion in *Green v. County School Board*:²⁵

22. *Id.* at 636-37 (emphasis added).

23. *Id.* at 637.

24. *Id.* at 638. On remand, the district court held: (1) that the school board had complied in good faith with the initial desegregation decree from the time it was entered until adoption of the neighborhood school plan; (2) that there was no indication that the school board would return to a system of de jure segregation in the future; (3) that the vestiges of past discrimination had been eliminated to the extent practicable; (4) that the Board was entitled to complete dissolution of the initial decree; and (5) that the neighborhood school system was adopted for legitimate, nondiscriminatory reasons in compliance with applicable equal protection principles. *Dowell v. Board of Educ.*, 778 F. Supp. 1144, 1196 (W.D. Okla. 1991).

25. 391 U.S. 430 (1968).

In considering whether the vestiges of *de jure* segregation had been eliminated as far as practicable, the District Court should look not only at student assignments, but "to every facet of school operations [E]xisting policy and practice with regard to faculty, staff, transportation, extra-curricular activities, and facilities are among the most important indicia of a segregated system."²⁶

The respondents also had contended that the Tenth Circuit held that the district court's finding—that residential segregation in Oklahoma City was the result of private decisionmaking and economics and too attenuated to be a vestige of the former school segregation—was clearly erroneous. The Court concluded, however, that the Tenth Circuit's finding on this point was at least ambiguous. To dispel any doubt, the Court directed that the district court and the court of appeals treat this question as *res nova*.²⁷

Finally, the Court stated that once a school system has eliminated the vestiges of *de jure* segregation, the school system no longer requires court authorization for the promulgation of policies and rules regulating matters such as the assignment of students.²⁸ Challenges to subsequent actions by school boards, including those related to student reassignments, should be evaluated by the equal protection principles articulated in *Washington v. Davis*²⁹ and *Arlington Heights v. Metropolitan Housing Development Corp.*³⁰

II. *FREEMAN V. PITTS*

In *Dowell*, the district court had relinquished all remedial control over the Oklahoma City School System. By contrast, in *Freeman v. Pitts*,³¹ the district court had determined that control could be relinquished only over those aspects of the system in which the vestiges of the prior discriminatory conduct had been eradicated. The district court retained supervisory authority over the aspects of the school system that were not in full compliance.³² Dekalb County School System (DCSS) is located in a suburban area outside of Atlanta, Georgia. In 1968, African-American school children and their parents instituted this class action.

26. *Board of Educ. v. Dowell*, 111 S. Ct. 630, 638 (1991) (citing *Green*). These criteria for evaluation are now known as "the *Green* factors."

27. *Id.* at 638 n.2.

28. *Id.* at 638.

29. 426 U.S. 229 (1976).

30. 429 U.S. 252 (1977).

31. 112 S. Ct. 1430 (1992).

32. *Id.* at 1435-36.

After the suit was filed, DCSS worked out a comprehensive desegregation plan with the Department of Health, Education and Welfare (HEW). The district court approved the proposed plan and entered a consent order in June, 1969. Under the plan, all of the former de jure black schools in DCSS were closed and their students were reassigned to the remaining neighborhood schools. The district court found that DCSS was desegregated for a short period of time under this court-ordered plan.

According to the Supreme Court, between 1969 and 1986, the respondents sought only infrequent and limited judicial intervention.³³ The population in Dekalb County grew significantly between 1969 and 1986. Whites migrated to the northern part of the county, while African-Americans migrated to the southern part. In 1969, African-Americans made up only 5.6% of the student body of DCSS. By the 1986-87 school year, however, their percentage had increased to 47%. A significant amount of racial imbalance in student school assignments also existed in DCSS. Half of the African-American students attended schools that were over 90% black, and 62% of them attended schools that had over 20% more black students than the system-wide average. Of the white students enrolled in DCSS, 27% attended schools that were over 90% white, and 59% of them attended schools where the percentage of white students exceeded by 20% the system-wide average of white students.

Despite this amount of racial imbalance in the schools, in 1986 the School Board filed a motion for final dismissal of the litigation. The district court examined whether DCSS had complied with the *Green* factors. Even though there was a significant racial imbalance in student assignments, the district court found that DCSS was unitary not only with regard to student assignments, but also in the areas of transportation, physical facilities, and extracurricular activities.³⁴ The district court concluded that the racial imbalance of the students was attributable to the rapid demographic shifts that had occurred in DeKalb County, and other factors, but not to the prior unconstitutional conduct of DCSS.³⁵

33. *Id.* at 1437.

34. *Id.* at 1442.

35. *Id.* at 1440. The district court examined the interaction between DCSS policy and the demographic changes in DeKalb County. Of the 170 changes made by DCSS, only three were found to have had a partial segregative effect, and that effect was considered minor. The district court concluded that DCSS achieved the maximum practical desegregation. It found that the existing segregation of students attributable to demographic shifts that were inevitable as the result of suburbanization, the decline in the number of children born to white families, blockbusting of formerly white neighborhoods, which led to "selling and buying of real estate in the DeKalb area on a highly dynamic basis . . . and the completion of Interstate 20, which made access from DeKalb County into the City of Atlanta much easier. *Id.*

In addition to the *Green Factors*, the district court also considered whether the quality of education being offered to the white and black student population was equal. Because of the existence of such a large amount of racial imbalance, there were many schools in the system that were predominately black or predominately white. The district court not only examined resource allocation, but also examined measures of student achievement. The district court found that vestiges of the dual system remained in the areas of teacher and principals assignments (one of the *Green Factors*).³⁶ The district court also found that DCSS assigned experienced teachers and teachers with graduate degrees in a racially imbalanced manner³⁷ and that DCSS spends more money educating white students than it does on the education of black students.³⁸ The district court ordered DCSS to equalize per pupil expenditures and to assign experienced teachers and teachers with advanced degrees equally between the primarily black schools and the primarily white schools.³⁹ The district court, however, rejected the notion that DCSS had not done enough to improve the educational performance of black students, specifically citing to improvements by African-American students on the Iowa Tests of Basic Skills and the Scholastic Aptitude Test of DCSS' black students.⁴⁰

The Eleventh Circuit rejected the district court's incremental approach to the elimination of vestiges of prior de jure conduct. It held that the district court had erred in considering the six *Green* factors as separate categories.⁴¹ In order for a school system to achieve unitary status, it must satisfy all of the *Green* factors at the same time for at least three years.⁴² The Eleventh Circuit also held that a system that once had been segregated by law could not justify continued racial imbalance by pointing to demographic changes, at least until the system had eradicated all vestiges of segregation.⁴³ Given that DCSS had not done this, the Eleventh Circuit held that it bore the responsibility for the current racial imbalance and had to correct that imbalance.⁴⁴

In a majority opinion authored by Justice Kennedy,⁴⁵ the Supreme Court agreed with the district court's conclusion that the *Green* factors

36. *Id.* at 1441.

37. *Id.*

38. *Id.* at 1442.

39. *Id.*

40. *Id.* at 1441-42.

41. *Pitts v. Freeman*, 887 F.2d 1438, 1446 (11th Cir. 1989).

42. *Id.* at 1450.

43. *Id.* at 1449.

44. *Id.* at 1448-49.

45. *Freeman v. Pitts*, 112 S. Ct. 1430, 1435-50 (1992). Justice Kennedy's opinion was joined by Chief Justice Rehnquist and by Justices White, Scalia, and Souter. In

could be considered separately and that partial relinquishment of supervision and control of a school system in an appropriate case does not offend the Constitution:

We hold that, in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations. . . . [U]pon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all areas, the court in appropriate cases may return control to the school system in those areas where compliance has been achieved, limiting further judicial supervision to operations that are not yet in full compliance with the court decree. In particular, the district court may determine that it will not order further remedies in the area of student assignments where racial imbalance is not traceable, in a proximate way, to constitutional violations.⁴⁶

Kennedy's opinion emphasized that the decision to withdraw partial supervision lay in the sound discretion of the district court.⁴⁷ His opinion went on to note that a number of factors are to be considered in determining whether partial withdrawal is warranted: First, whether there has been full and satisfactory compliance with the court decree in those parts of the system where supervision is being withdrawn; second, whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other areas of the school system; and finally, whether the school district has demonstrated, both to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and Constitution that were the basis for judicial intervention in the first place.⁴⁸ Kennedy went on to note that in considering these factors a court should give particular attention to the school system's record of compliance. A school system is in a better position to demonstrate "[a] good-faith commitment to a constitutional course of action

addition to joining the opinion of the Court, Justices Scalia and Souter also wrote separate concurring opinions. For a discussion of Souter's concurrence, see *infra* notes 63-67, 104-06 and accompanying text. For a discussion of Scalia's concurrence, see *infra* note 83, 94, 99-100 and accompanying text.

46. *Freeman*, 112 S. Ct. at 1445-46. Kennedy noted that this position was the actual position the Court took in *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976). *Freeman*, 112 S. Ct. 1430, 1444-45 (1992).

47. *Freeman*, 112 S. Ct. at 1446.

48. *Id.*

when its policies form a consistent pattern of lawful conduct"⁴⁹

Both parties to the litigation agreed that quality of education was a legitimate subject of inquiry for the district court. The Supreme Court, therefore, indicated that it was not necessary for it to review this aspect of the lower court's actions. However, the Court approvingly noted that the district court's consideration of quality of education illustrated the fact that the *Green* factors were not to be a rigid framework.⁵⁰

One of the major issues in this case was whether the district court was correct in releasing its control over student assignments. Justice Kennedy specifically examined whether the district court in *Freeman* had appropriately exercised its discretion when it withdrew supervision from DCSS's student assignments. The Court wrote:

Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors.⁵¹

Kennedy's opinion made it clear that "[t]he school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation."⁵² Kennedy went on to add, however, that if a school district's desegregation plan has eliminated all racial imbalance attributable to the district's prior unlawful segregation, then the district court is under no duty to remedy an imbalance that is caused by demographic factors.⁵³

Much of the remaining discussion in the Court's opinion related to the issue of whether the existing student segregation should be said to be attributable either to private decision making or to the original constitutional violation and subsequent action by the state.⁵⁴ The Court's analysis of this issue turned on the fact that the existing student segregation was the result of residential segregation.⁵⁵ As a result, it was necessary to inquire into the basis of residential segregation. If the residential segregation can be traced to factors other than the state's

49. *Id.*

50. *Id.* at 1446-47.

51. *Id.* at 1447. The Court went on to quote from its opinion in *Swann*. "[I]n the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary." *Id.* (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31-32 (1971)).

52. *Id.*

53. *Id.* at 1448.

54. *Id.* at 1447-50.

55. *Id.* at 1448.

attempt to fix or alter demographic patterns, then the residential segregation is not traceable to state action.

Kennedy noted that our society is a very mobile one.⁵⁶ Given the disparate preferences between blacks and whites with respect to the racial mix of neighborhoods, it is unlikely that racially stable neighborhoods will emerge.⁵⁷ Where resegregation is the product of private choices, the Court concludes that it does not have constitutional implications.

It is beyond the authority and beyond the practical ability of federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated.⁵⁸

The Court's opinion also considered whether retention of judicial control over student attendance was necessary to achieve compliance with other facets of the school system that were not in compliance.⁵⁹ The Court wrote that racial balancing of student assignments may be a legitimate remedial device to correct other fundamental inequities that were themselves caused by the constitutional violation. The Court noted that there was no showing that racial balancing was an appropriate mechanism to cure those aspects of the school system that were not in compliance at the time the district court released supervision of student assignments.⁶⁰ The case was remanded so that the district court could make specific findings with respect to whether it was necessary to retain control over student assignments in order to accomplish compliance in the areas that were not then in compliance.⁶¹

In addition, the Court noted that the district court did not address the issue stated in *Dowell* regarding the good faith compliance by the school district with the court order over a reasonable period of time.

A history of good-faith compliance is evidence that any current racial imbalance is not the product of a new *de jure* violation,

56. "In one year (from 1987 to 1988) over 40 million Americans, or 17.6% of the total population, moved households. . . . Over a third of those people moved to a different county, and over six million migrated between States." *Id.* at 1447-48 (citing U.S. DEPT. OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE U.S., p. 19, Table 25 (11th ed. 1991)).

57. According to evidence heard by the district court, African-Americans prefer a 50%—50% neighborhood racial mix, whereas whites prefer a mix of 80% white and 20% black. *Id.* at 1448.

58. *Id.*

59. *Id.* at 1449.

60. *Id.*

61. *Id.*

and enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future.⁶²

Justice Souter added a brief concurrence.⁶³ The opinion of the Court indicated that judicial control of student and faculty assignments may remain necessary to remedy the persisting vestiges of a dual system. Souter wrote separately, however, to note two additional situations in which continued judicial control may be necessary. First is the situation where the demographic change toward segregated residential patterns is itself caused by past school segregation and the patterns of thinking that segregation creates.⁶⁴ "Such demographic change is not an independent, supervening cause of racial imbalance in the student body, . . . and before deciding to relinquish supervision and control over student assignments, a district court should make findings on the presence or absence of this relationship."⁶⁵

A second, related causal relationship occurs after the district court relinquishes supervision over a remedied aspect, and future imbalance in that remedied aspect is caused by remaining vestiges of the dual system. In other words, the vestige of discrimination in one aspect becomes the incubator for resegregation in others. Justice Souter discussed the potential that segregated faculties could send whites and blacks into schools based on faculty race and, as a result, increase student segregation along those lines.⁶⁶ Even though the student assignment problem had been remedied, it is possible that segregation of students could be the result of the fact that people moved to the schools where the faculty were segregated. Consequently, before a district court ends its supervision of student assignments, it should make a finding that there is no immediate threat of unremedied *Green*-type factors causing population or student enrollment changes that, in turn, may imbalance student composition.⁶⁷

Justice Blackmun also wrote a concurring opinion, which was joined by Justices Stevens and O'Connor.⁶⁸ Blackmun agreed with what he considered to be the holding of the Court, that in some circumstances a district court need not interfere with a particular portion of a school system while retaining jurisdiction over the entire system. He also agreed

62. *Id.* at 1449-50.

63. *Id.* at 1454-55 (Souter, J., concurring).

64. *Id.* at 1454 (Souter, J., concurring).

65. *Id.* at 1454 (Souter, J., concurring).

66. *Id.* at 1454-55 (Souter, J., concurring).

67. *Id.* (Souter, J., concurring).

68. This case was argued before Justice Thomas took the bench; he did not participate in the decision.

that the good faith of the school board is relevant in inquiries about the elimination of the vestiges of state imposed segregation. Finally, he agreed that DCSS must balance student assignments if an imbalance is traceable to unlawful state policy and if such an order is necessary to fashion an effective remedy. He wrote separately to address what it means for the district court to retain jurisdiction over a part of the case while relinquishing supervision and control over a subpart of the school system.⁶⁹ He agreed that, although active supervision over a particular aspect of a school system could be relinquished, the court must still retain jurisdiction over the entire system as a whole. The district court, therefore, has the ability to reassert active control over those areas from which it has withdrawn.

Justice Blackmun also discussed the issue of racial imbalance being traceable to the board actions. According to Blackmun, DCSS did not escape its duty to desegregate merely by showing "that demographics exacerbated the problem."⁷⁰ Rather, DCSS must prove that its own policies—including, for example, faculty assignment, placement of new schools, and the closing of old schools—did not contribute to residential segregation. For Blackmun, district courts must examine policies and practices of the school district closely to determine if they contribute to residential segregation. Blackmun noted that the district court in *Freeman* had not properly engaged in that inquiry. According to Blackmun, the available evidence suggested that this would be a difficult burden for DCSS to meet.⁷¹

III. IMPLICATIONS OF *DOWELL* AND *FREEMAN*

There are some clear implications that flow from the Supreme Court's opinions in these two cases. To begin with, because the Court emphasized that federal judicial supervision was intended to be temporary, it follows that at some point in time, school districts should be allowed to terminate court supervision. When that time is reached, the existing desegregation decree would be dissolved. Complete authority over student and faculty assignments and other aspects of the school system is returned to school authorities. A school district is free to adopt new student and faculty assignment policies, even if an increase in the amount of racial imbalance occurs. The decision to adopt and implement such policies is to be analyzed under the traditional test of discriminatory intent for equal protection violations articulated by the Court in *Washington v. Davis*⁷²

69. *Freeman*, 112 S. Ct. at 1455-60 (Blackmun, J., concurring in the judgment).

70. *Id.* at 1457 (Blackmun, J., concurring in the judgment).

71. *Id.* at 1457-58 (Blackmun, J., concurring in the judgment).

72. 426 U.S. 229 (1976).

and *Arlington Heights v. Metropolitan Housing Development Corp.*⁷³

A. Good Faith Compliance

Beyond these relatively clear aspects, issues involving the termination of court supervision are somewhat opaque. The Court's opinions in *Dowell* and *Freeman* give district courts broad discretion in determining whether partial or complete withdrawal of court supervision is warranted. For purposes of determining the elimination of all or part of the vestiges of the prior de jure conduct, the Court requires lower courts to examine the *Green* factors, which represent the observable racial balance. Both *Dowell* and *Freeman*, however, suggest that racial imbalance may not be the primary consideration in determining whether all or part of court supervision should be terminated. In *Dowell*, the Court accepted the possibility that after a desegregation decree is dissolved, current residential segregation can justify subsequent resegregation of students. In *Freeman*, the Court accepted the possibility that the vestiges of prior de jure conduct with regard to student assignments can be eliminated even if a significant amount of racial imbalance with respect to students exists at the time of the decision to terminate partial supervision.

In both cases, the Court noted that one prerequisite to partial or complete termination of court supervision is good faith compliance by the school district with the court decree for a reasonable period of time.⁷⁴ The Court also noted the importance of a determination that a school system will not return to its former ways of engaging in intentionally discriminatory practices.⁷⁵ It appears that the Court is requiring that school districts demonstrate that their attitude about African-Americans is positive. A school system no doubt must do more than simply indicate its changed attitude and willingness to comply with the Constitution. Specific policies, decisions, and courses of action must be examined in order to assess the school's good faith commitment.⁷⁶

The Supreme Court did not mention whether the good faith commitment requires a commitment to integration. The Tenth Circuit, in applying the Supreme Court's opinions in *Dowell* and *Freeman* to the original lawsuit in *Brown v. Board of Education*,⁷⁷ however, concluded:

73. 429 U.S. 252 (1977).

74. *Freeman*, 112 S. Ct. at 1446, 1449-50; *Board of Educ. v. Dowell*, 111 S. Ct. 630, 637-38 (1991). In his concurring opinion in *Freeman*, Justice Blackmun also agreed that the good faith of the school board is relevant in inquiries about the elimination of vestiges of state imposed segregation. 112 S. Ct. at 1455 (Blackmun, J., concurring in the judgment).

75. *Freeman*, 112 S. Ct. at 1445; *Dowell*, 111 S. Ct. at 636-37.

76. *Freeman*, 112 S. Ct. at 1446; *Dowell*, 111 S. Ct. at 636-37.

77. *Brown v. Board of Educ.*, 978 F.2d 585 (10th Cir. 1992).

we are convinced that evaluation of the "good faith" prong of the *Dowell* test must include consideration of a school system's continued commitment to integration. A school system that views compliance with a school desegregation plan as a means by which to return to student assignment practices that produce numerous racially identifiable schools cannot be acting in "good faith."⁷⁸

This interpretation of the Tenth Circuit, however, appears to be inconsistent with the Supreme Court's opinion in *Dowell*. Recall that as the Supreme Court addressed the situation in Oklahoma City, it also had in front of it the decision by the Oklahoma City School Board to adopt a neighborhood school attendance plan.⁷⁹ The effect of that plan was to substantially increase racial segregation in school assignments over those contained in the court ordered desegregation plan. The Supreme Court's instruction in *Dowell* to the lower courts on remand did not require them to assess the segregative effect of the neighborhood attendance plan in addressing the good faith requirement.⁸⁰ Rather, the Court held that any subsequent decisions by the school board after termination of the desegregation decree must be judged by the traditional intent standards normally applied in equal protection challenges. The Supreme Court's opinion in *Dowell*, therefore, appears to contradict the Tenth Circuit's interpretation that the good faith component requires a school system to be committed to integration.⁸¹ Rather, with regard to future actions, the school board must be committed to the traditional equal protection test, which focuses upon discriminatory intent.

B. Residential Segregation as a Vestige of the Prior De Jure Conduct

Perhaps the most complex issue in determining whether court supervision should be released in whole or in part is the existence of

78. *Id.* at 592 (citing *Board of Educ. v. Dowell*, 111 S. Ct. 630, 637 (1991)).

79. *See supra* notes 9-14 and accompanying text.

80. If the Supreme Court agreed with the Tenth Circuit's interpretation of the good faith requirement, such an analysis would have been required by the Supreme Court. In fact, the Court's opinion in *Dowell* was issued over the strong dissent by Justice Marshall that was joined by Justices Blackmun and Stevens. Justice Marshall was clearly concerned about the resegregative effect of adopting a neighborhood school attendance policy. *Dowell*, 111 S. Ct. at 644-48 (Marshall, J., dissenting).

81. It may be that the Tenth Circuit was concerned about the possible resegregative impact of terminating school desegregation decrees, feeling that a movement to neighborhood schools would increase segregation of public schools and thereby make a mockery out of all of the effort that went into desegregating America's public schools over the past 40 years. Nevertheless, it appears as if that is the precise result that is sanctioned by the Supreme Court's opinions in *Dowell* and *Freeman*.

current residential segregation. Prior to *Dowell*, the Supreme Court had not addressed whether residential segregation could be considered a vestige of operating a dual school system.⁸² Both *Dowell* and *Freeman* require an examination into the causes of current residential segregation in order to determine whether it is the result of private decision making or state action. "[T]he principal cause of racial and ethnic imbalance in . . . public schools across the country—North and South—is the imbalance in residential patterns."⁸³ Residential segregation is a way of life in the United States and is likely to remain so for sometime.⁸⁴ Hence, the Court's resolution of how to treat current residential segregation is likely to have profound implications for the termination of existing school desegregation decrees.

Residential segregation is the result of many diverse influences, including discrimination by private organizations as well as private individuals acting pursuant to their own social and economic reasons.⁸⁵

82. See Drew S. Days, III, *School Desegregation Law in the 1980s: Why Isn't Anybody Laughing?*, 95 YALE L.J. 1737 (1986) (reviewing PAUL R. DIMOND, *BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION* (1985) and stating that Dimond's book provides a compelling rebuttal to those who claim that residential segregation is the result of purely advantageous events).

83. *Freeman v. Pitts*, 112 S. Ct. 1430, 1451 (1992) (Scalia, J., concurring) (quoting *Austin Indep. Sch. Dist. v. United States*, 429 U.S. 990, 994 (1976) (Powell, J., concurring)). In addition to joining the opinion of the Court, Justice Scalia wrote a separate concurring opinion. Scalia criticized the Court because it did not articulate an easily applicable test to determine whether or not residential segregation is the result of public or private action. He noted that racially imbalanced schools resulting from residential segregation are the result of a blend of public and private actions. As a result, it is impossible to separate out what part is public from what part is private, and the attempt to do so is only guesswork. He argued for a standard with respect to residential segregation that if school boards adopt plans allowing for neighborhood schools and for free choice of other schools (transportation paid), then the constitutional violation with respect to students should be considered remedied. *Id.* at 1450-54 (Scalia, J., concurring). "[W]hatever racial imbalances such a free-choice system might produce would be the product of private forces." *Id.* at 1452 (Scalia, J., concurring).

84. See, e.g., GARY ORFIELD, *MUST WE BUS?* 50-51, 54-55 (1978); Deleeuw et al., *Housing*, in *THE URBAN PREDICAMENT* 119, 145-55 (W. Gorham & N. Glazer eds., 1976); Farley, *Residential Segregation and its Implications for School Integration*, in *THE COURTS, SOCIAL SCIENCE, AND SCHOOL DESEGREGATION* 164, 169 (B. Levin & W. Hawley eds., 1975); Albert I. Hermalin & Reynolds Farley, *The Potential for Residential Integration in Cities and Suburbs: Implications for the Busing Controversy*, 38 AM. SOC. REV. 595, 605-08 (1973).

85. In *Keyes v. School Dist. No. 1 Denver, Colo.*, 413 U.S. 189, 222-23 (1973), Justice Powell, concurring in part and dissenting in part, said that, in his opinion, housing separation of the races resulted from purely natural and neutral nonstate causes. Presumably what Powell meant was that housing segregation was the result of private choices. Chief Justice Burger and current Chief Justice Rehnquist concurred with Powell in his separate opinion in *Austin Indep. Sch. Dist. v. United States*, 429 U.S. 990, 994 (1976), in which

Residential segregation is also, in part, the result of discriminatory activities by non-school governmental authorities at the federal, state, and local level. Prior actions by governmental authorities have impacted on the amount of residential segregation that exists in the United States today. In the past, local authorities often prohibited integrated neighborhoods through the use of city ordinances,⁸⁶ zoning practices,⁸⁷ and by segregating public housing.⁸⁸ Racial discrimination by state authorities existed with respect to the enforcement of racially restrictive covenants.⁸⁹ Federal authorities contributed to segregated housing with the requirement that houses qualifying for federal mortgage insurance programs have racially restrictive covenants.⁹⁰ Residential segregation is also a product of the operation of a dual school system.⁹¹ Over twenty years ago, Chief Justice Burger noted that people gravitate toward school facilities. Just as schools are located in response to the needs of people, the location of schools may also influence residential patterns.⁹²

Powell wrote, in a concurrence, "[e]conomic pressures and voluntary preferences are the primary determinants of residential patterns." See also Clark, *Residential Segregation in American Cities: A Review and Interpretation*, 5 POPULATION RES. & POL'Y REV. 95-127 (1986). Dr. Clark was commissioned by the United States Commission on Civil Rights to conduct a study and present his findings on the causes of residential segregation. He concluded that the following factors influence residential segregation today: (1) economics and housing affordability; (2) personal preferences and social relationships; (3) urban structure; and (4) private discrimination.

86. See, e.g., *Dowell v. Board of Educ.*, 778 F. Supp. 1144, 1160 (W.D. Okla. 1991).

87. See, e.g., *Buchanan v. Warley*, 245 U.S. 60 (1917).

88. See, e.g., PAUL R. DIMOND, *BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION* (1985). The author talks about residential segregation and about government culpability in creating it. He uses *Hills v. Gautreaux*, 425 U.S. 284 (1976), as a primary case, supplemented by shorter discussions of *Warth v. Seldin*, 422 U.S. 490 (1975), and *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

89. It was not until 1948 that the Supreme Court struck down racially restrictive covenants in *Shelley v. Kraemer*, 334 U.S. 1 (1948).

90. The Federal Housing Administration required the assertion of racially restricted covenants in all properties which received FHA insurance until 1949. DIMOND, *supra* note 84 at 184.

91. The Supreme Court noted the interrelationship and possibility, in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20-21 (1971), that the location of schools may influence the patterns of residential development of a metropolitan area, and have an important impact on the composition of inner-city neighborhoods. See also *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 465 n.13 (1979); DIMOND, *supra* note 88, at 56-59. Dimond argues that school boards' actions help create segregated neighborhoods because families tend to move near the schools that their school age children attend.

92. *Swann*, 402 U.S. at 20-21. The Court also noted that discriminatory school assignment policies "may well promote segregated residential patterns which, when combined with neighborhood zoning, further lock the school system into the mold of separation of the races." *Id.* at 21.

As the Court approached the issue of how to treat residential segregation, it was given the opportunity of choosing between positions articulated by Justice Marshall in his dissent in *Board of Education v. Dowell*⁹³ and by Justice Scalia in his concurring opinion in *Freeman v. Pitts*.⁹⁴ Marshall's opinion noted the role that the state and local officials and the Board of Education of Oklahoma City played in creating what he described as self-perpetuating patterns of residential segregation.⁹⁵ In Oklahoma, city residential segregation was originally enforced by an Oklahoma City ordinance that specified the areas in which blacks and whites were to live.⁹⁶ African-Americans today are still the primary residents in the areas originally ceded to them, even though that law was declared unconstitutional in 1935 by the Oklahoma Supreme Court.⁹⁷ Marshall, therefore, took the position that current residential segregation was a vestige of prior de jure conduct, because state action resulted in self-perpetuating patterns of residential segregation. For Marshall, desegregation decrees should remain in effect when it is clear that their removal would result in a significant number of racially identifiable schools due to residential segregation that could otherwise be prevented.⁹⁸

By contrast, in *Freeman* Scalia argued that it is impossible to determine what part of residential segregation is traceable to public action and what part is private. Moreover, the attempt to do so is only guesswork.⁹⁹ Scalia proposed a standard with respect to residential segregation that would say if school boards adopt plans that allow for neighborhood schools and for free choice of other schools (transportation paid), then the vestiges of the prior discriminatory conduct with respect to students should be considered remedied. "[W]hatever racial imbalances such a free-choice system might produce would be deemed the product of private forces."¹⁰⁰

In *Freeman*, Kennedy's opinion rejected both of these positions and instead sought a middle ground. Kennedy's opinion in effect forces lower courts to determine the cause of existing residential segregation. Racially

93. 111 S. Ct. 630, 639-48 (1991) (Marshall, J., dissenting).

94. 112 S. Ct. 1430, 1450-54 (1992) (Scalia, J., concurring).

95. As I understand the use of the term "self-perpetuating patterns of residential segregation," Justice Marshall is referring to residential segregation. It does not matter whether the character of segregated neighborhoods was created recently with the movement of one racial group out of a given area and the movement of another racial group into that area, or whether the segregated neighborhood is one of long standing duration. What is important is the existence of segregated residential patterns.

96. *Dowell v. Board of Educ.*, 778 F. Supp. 1144, 1160 (W.D. Okla. 1991).

97. *Allen v. Oklahoma City*, 52 P.2d 1054 (1935).

98. *Dowell*, 111 S. Ct. 630, 644 (1991) (Marshall, J., dissenting).

99. *Freeman*, 112 S. Ct. 1430, 1452 (1992) (Scalia, J., concurring).

100. *Id.*

imbalanced neighborhood schools that are the product of private residential decision making are not based upon de jure segregation's negative stigmatic assumptions about African-Americans. Kennedy appears to accept the notion that such schools are based upon legitimate educational and community benefits derived from neighborhood schools. Neighborhood schools minimize the safety hazards to children in reaching school, reduce the cost of transporting students so that more funds can be allocated to educational matters, ease pupil placement and administrative costs through easily determined student assignment policies, and increase communication between home and school.¹⁰¹ The School Board of Oklahoma City specifically argued that its primary reasons for adopting the SRP were to increase parental involvement and to increase the level of community involvement and support in the schools. Neighborhood schools allow for greater parental involvement and thereby improve the academic environment for the youngsters in those schools.

Even though Justice Souter joined the Court's opinion in *Freeman*, he also wrote a separate concurrence that appears to be directed toward school systems other than DCSS. Souter's concurring opinion is enigmatic. Justice Souter specifically addressed the issue of residential segregation and satisfying his concurring opinion is necessary in order to achieve a five-person majority.¹⁰² Justice Souter's concurring opinion appears to require a district court to do more with regard to residential segregation than Kennedy's opinion. Souter noted that prior to relinquishing supervision and control over student assignments, a district court should make findings that racial imbalance in students assignments is not caused by past school segregation and "*the patterns of thinking that segregation creates.*"¹⁰³ Justice Souter unfortunately did not elaborate on what he meant by racial imbalance caused by "patterns of thinking that segregation creates."

Because Justice Souter joined Kennedy's opinion, it can be inferred that if segregated residential neighborhoods are of recent origins—like those in Dekalb County—they are less likely to be products of patterns of thinking that segregation creates. For neighborhoods that have been segregated for sometime, however, the analysis is on considerably less firm ground.¹⁰⁴

101. See, e.g. *Deal v. Cincinnati Bd. of Educ.*, 369 F.2d 55, 60 (6th Cir. 1966).

102. Although Justice Scalia also wrote a separate concurring opinion that addressed the issue of residential segregation, his test is relatively easy to satisfy.

103. 112 S. Ct. at 1454 (Souter, J., concurring) (emphasis added).

104. Justice Souter did not take part in the Court's decision in *Dowell*. It could be that Souter is attempting to revive Justice Marshall's notion of self-perpetuating patterns of residential segregation—at least with regard to residential neighborhoods that have been segregated for some time. These patterns could be seen as resulting from patterns of thinking that segregation creates.

Justice Souter may be drawing a distinction between racially segregated neighborhoods that develop after the implementation of a school desegregation decree—like those that existed in DeKalb County—and those that predated court supervision. For segregated neighborhoods of recent origin, it will be easier to attribute their development to private decision-making and not to state action. However, segregated neighborhoods that exist today and whose origins predate court supervision are more likely to reflect “the patterns of thinking that segregation creates.” Justice Souter may be less likely to agree that court supervision over student assignments in these neighborhoods should be released as readily as those in the kinds of segregated neighborhoods—those that developed after court supervision—that the court encountered in Dekalb County.

If Justice Souter is making this kind of distinction, he appears to be at odds with how Justice Kennedy’s opinion would view segregated neighborhoods that predated court supervision. It should be recalled that Justice Souter was the only Justice in *Freeman* who did not participate in the Court’s opinion in *Dowell*. As Marshall noted in his dissenting opinion in *Dowell*, there were neighborhoods in Oklahoma City where segregation could be traced back to governmental action that occurred over fifty years ago. The majority in *Dowell* implicitly rejected Marshall’s concept of “self-perpetuating patters of residential segregation.” Justice Kennedy also focused on the mobility of people in the United States in his opinion in *Freeman*. This indicates that it is the sheer fact of moving that is important to Kennedy. For Kennedy, whether blacks move into neighborhoods that were historically black prior to court supervision and whites move into neighborhoods that were historically white prior to the initiation of desegregation appears to be irrelevant. The relevant issue appears to be mobility.

C. Conversion of School Desegregation Lawsuits to Quality Education Lawsuits

The Supreme Court’s opinion in *Freeman v. Pitts*¹⁰⁵ has the potential to lead to a conversion of desegregation lawsuits into quality of education lawsuits. The Court’s opinion in *Freeman* provides that a district court with a considerable amount of discretion with respect to whether in an appropriate case it can terminate its control over certain aspects of a school system while maintaining control over other aspects.¹⁰⁶ In addition, the Court’s opinion also approved the district court’s considering of quality of education between the existing black and white schools as an additional factor in determining whether or not supervision over a school

105. 112 S. Ct. 1430, 1446 (1992).

106. *Id.*

desegregation decree should be released. This sets up the possibility for a district court—under proper circumstances—to release control over student assignments. But the district court could also maintain control over other aspects of the school system in order to assure that any racially imbalanced schools receive equal quality education, including equal funding. The effect would be to convert desegregation lawsuits to quality education lawsuits. This is the most likely result of the Court's opinion of *Freeman*.

IV. THE INDIANAPOLIS PUBLIC SCHOOL DESEGREGATION CASE

On May 31, 1968, the Department of Justice filed suit in the United States District Court for the Southern District of Indiana alleging that the Indianapolis School Board operated a racially segregated school system.¹⁰⁷ Starting in 1971, 387 African-American students were bussed to Franklin Township schools. Two years later, the district court ordered the Indianapolis School Board to desegregate.¹⁰⁸ The Board decided to bus students within IPS districts and also sought to bus students across school district lines to contiguous suburban school systems. On appeal, the Seventh Circuit restricted the student transfers to within Marion County.

There are a number of school systems with cross-district desegregation plans.¹⁰⁹ IPS, however, is one of the few school systems that has a mandatory, as opposed to voluntary, cross-district bussing component. The cross-district bussing feature of the IPS desegregation case creates a number of issues that were not addressed by the Supreme Court in its two recent opinions. In addition, the mandatory feature of the cross-district desegregation plan will create a number of relatively unique issues that many lower courts with voluntary cross-district plans will not have to address as they terminate court supervision.

For purposes of terminating a portion of federal court supervision, it might be legally possible to separate the intradistrict desegregation of

107. William E. Marsh, *The Indianapolis Experience: The Anatomy of a Desegregation Case* 9 IND. L. REV. 897, 904 (1976).

108. *United States v. Board of Sch. Comm'rs of Indianapolis*, 368 F. Supp. 1191 (S.D. Ind. 1973).

109. See, e.g., *Evans v. Buchanan*, 416 F. Supp. 328, 344 (D. Del. 1976), *aff'd*, 555 F.2d 373 (3rd Cir.) (en banc), *cert. denied*, 476 U.S. 1186 (1986) (Wilmington, Del.); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 778 F.2d 404, 433 (8th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1186 (1986) (Little Rock, Ark.); *Hoots v. Pennsylvania*, 510 F. Supp. 615, 622 (W.D. Pa. 1981), *aff'd*, 672 F.2d 1107 (3rd Cir. 1982), *cert. denied*, 459 U.S. 824 (1982) (suburban Pittsburgh); and *Turner v. Warren County Bd. of Educ.*, 313 F. Supp. 380, 386 (E.D.N.C. 1970) (rural N.C.).

IPS from the interdistrict desegregation plan.¹¹⁰ If so, much of the analysis from *Dowell* and *Freeman* can be applied to an attempt to terminate court supervision over all or part of either the interdistrict or the intradistrict desegregation plan. The Indianapolis School Board, for example, might seek to eliminate all or part of the court supervision over the intradistrict portion of the desegregation plan, while allowing the federal district court to maintain its control over the cross-district elements of the desegregation plan. This Article will, therefore, address the matters that will be central to an analysis of whether all or part of the district court's supervision over the intradistrict aspects of the IPS desegregation plan could be released. I will conclude this Article by highlighting some of the issues that termination of all or part of the cross-district elements of the desegregation plan will have to resolve.

The intradistrict desegregation plan for IPS was put into effect in 1973, and has been in operation for the past 20 years. When the School Board in *Dowell* adopted a neighborhood student assignment plan, it had operated under its court approved desegregation plan for only twelve years.¹¹¹ In *Freeman v Pitts*, the School Board had operated under court supervision for seventeen years when the Supreme Court approved the district court's decision to terminate partial control. The passage of time, therefore, should not be a major issue for IPS.

Enforcing a desegregation plan for a reasonable period of time is only the beginning of the analysis of whether partial release from the desegregation decree is warranted. The primary issues the district court must focus upon will be nebulous, intangible considerations. The Indianapolis school board must demonstrate that it has satisfactorily complied with the portion of the desegregation decree from which supervision is to be withdrawn. The district court also will have to examine whether it is necessary to maintain control over certain aspects of the IPS desegregation case for which release is being sought (such as student and/or faculty assignments within IPS), in order to achieve compliance in other facets of the dual school system. In addition, the Indianapolis school board also must demonstrate its good faith commitment to the whole of the court's decree and to the provisions of the law and the Constitution that were the predicate for judicial intervention. In making these determinations, the federal district court will examine the record of compliance by the Indianapolis school board with its prior decisions.

110. Since *Freeman* did not involve a cross-district desegregation decree, an argument can be made that it is not applicable to school systems that are seeking partial termination.

111. Eleven years had elapsed during the filing of the initial complaint and the institution of the court approved plan. On remand, the federal district court concluded that the School Board had made a sufficient showing to justify the termination of court supervision as of 1985. *Dowell v. Board of Educ.*, 778 F. Supp. 1144, 1196 (1991).

If court supervision over intradistrict student assignments is to be released, then the district court also must address whether existing racial segregation in IPS districts is a vestige of the prior de jure conduct or the result of private decision making. The district court must therefore determine the cause of residential segregation.

As indicated earlier, Kennedy's opinion appears to imply that the key to determining whether present residential segregation is the result of private decision making is mobility. Because it will be necessary to satisfy Justice Souter, the district court also should make findings concluding that racial imbalance in student assignments is not caused by past school segregation or the patterns of thinking that segregation creates.

Finally, since the Supreme Court approved the inquiry into issues related to quality of education, it is certainly within the discretion of the district court to consider such factors in determining whether partial release of court supervision is warranted in Indianapolis. Consistent with what the district court in *Freeman* did, the district court addressing partial release of the Indianapolis school system may decide to examine resource allocation to and school performance of the black and white school children in IPS.

Termination of either the entire school desegregation decree in IPS or portions of the cross-district component of the desegregation decree raises extremely complicated issues. When the time comes to address the termination of any of the cross-district desegregation components, the district court will have to address such issues as the effect on the students who attend suburban school systems once court supervision is terminated. Are they automatically returned to IPS? Should they be considered as permanently ceded to the suburban school systems? Or should they be given the choice of choosing to attend suburban schools or IPS? Another set of important concerns will center around analyzing the issue of residential segregation, particularly Justice Souter's notion of patterns of residential thinking which segregation creates. Has Indianapolis created a pattern of residential thinking that suggests that African-Americans should not move to some suburban school districts? Issues related to good faith compliance also will be novel. What should the district court do if it finds that some, but not all, of the suburban school systems and the State of Indiana have complied in good faith? These and a number of other important issues await analysis by the district court. Because of the relatively unique circumstances caused by the mandatory cross-district busing component, I suspect that when these issues are addressed, there will not be a lot of guidance provided for the district court from other cases.

Update—Criminal Law and Procedure

SUSAN D. BURKE*

INTRODUCTION

During 1992, the United States Supreme Court issued only a limited number of significant decisions dealing with criminal law and procedure. Conversely, the Indiana Supreme Court granted transfer of a large number of Indiana Court of Appeals decisions and further evinced its apparent desire to adopt a formal set of evidentiary rules for Indiana. Additionally, the court continued to exercise its right to review and revise criminal sentences found to be inappropriate or contrary to the Indiana Constitution. The court also expressed its interest in the provision of legal services for indigent criminal defendants in Indiana.

Furthermore, two statutory enactments effective July 1, 1992, have generated considerable debate since their effective date, but resolution of the issues they raise must await the appellate courts' consideration. Because of the high volume of significant state court decisions and the availability of other sources reviewing United States Supreme Court decisions, this Article will concentrate on Indiana law.

I. STATUTORY ENACTMENTS

A new provision that allows incarcerated criminal defendants to petition for a reduction of their sentence under certain circumstances became effective July 1, 1992. Indiana Code section 35-38-1-23,¹ the

* Staff Attorney, Indiana Public Defender Council. B.S., 1973, Indiana University; M.S., 1975, Purdue University; J.D., 1985, Indiana University School of Law—Indianapolis. The author gratefully acknowledges the assistance in citation to authority of Jack Kenney, J.D., 1991, Indiana University School of Law—Bloomington.

1. IND. CODE § 35-38-1-23 (Supp. 1992). The statute provides:

(a) Notwithstanding IC 35-50-2-2, a person may petition the sentencing court for a reduction of sentence if:

- (1) the person has been sentenced to more than four (4) years imprisonment;
- (2) the person is in credit Class I;
- (3) there are less than two (2) years remaining until the person's earliest possible release date;
- (4) the person has successfully completed an educational, a vocational, or a substance abuse program that the department has determined to be appropriate; and
- (5) the person has demonstrated a pattern of behavior consistent with evidence

"earned credit time" statute, allows even those with nonsuspendible sentences to receive a reduction in their remaining sentence if they have participated in certain therapeutic, training, or rehabilitative programs while incarcerated. The grant of up to a two-year reduction in sentence is at the discretion of the trial court, but does not require the approval, or even the participation, of the prosecutor, as does the older sentence modification statute.² Additionally, the earned credit time statute may not be used unless the defendant has received greater than a four year sentence and less than two years remain until the inmate's earliest release date.³ In contrast, the older modification statute, which applies only to at least partially suspendible sentences, is more often applied for within the first year of the prisoner's incarceration.

Although Indiana Code section 35-38-1-23 makes no mention of any State involvement in the procedure for sentence reduction, a question has been raised as to whether those defendants sentenced for a term of years through plea agreements should be eligible for its benefits. This question arises from the doctrine established in *State ex rel. Goldsmith v. Marion Superior Court*,⁴ relating to the older sentence modification. In *Goldsmith*, the Indiana Supreme Court held that a defendant sentenced for a specific term of years under a plea agreement could not receive

of rehabilitation.

(b) Upon the filing of a petition under subsection (a), the court may reduce the sentence of the person by up to two (2) years upon a finding that:

- (1) all conditions of subsection (a)(1) through (a)(5) exist; and
- (2) reduction of the sentence is in the best interests of justice.

(c) The court may grant or deny the petition without a hearing and without making written findings or conclusions.

2. *Id.* § 35-38-1-17 (Supp. 1992). The statute provides in relevant part: Within three hundred sixty-five (365) days after:

- (1) the defendant begins serving his sentence;
- (2) a hearing at which the defendant is present and of which the prosecuting attorney has been notified; and
- (3) obtaining a report from the department of correction concerning the defendant's conduct while imprisoned; the court may reduce or suspend the sentence. The court must incorporate its reasons in the record.

(b) If more than 365 days have elapsed since the defendant began serving the sentence, and after a hearing at which the convicted person is present the court may reduce or suspend the sentence, subject to the approval of the prosecuting attorney. The court must give notice of the order to reduce or suspend the sentence under this section to the victim (as defined in IC 35-35-3-1) of the crime for which the defendant is serving the sentence.

(c) The court may suspend a sentence for a felony under this section only if suspension is permitted under IC 35-50-2-2.

3. *Id.* § 35-38-1-23.

4. 419 N.E.2d 109 (Ind. 1981).

a modification of sentence under Indiana Code section 35-38-1-17, unless the right to receive such a modification was preserved in the agreement.⁵ The rationale of *Goldsmith* was that if the defendant were allowed such a modification, it would undermine the "bargain" that had been negotiated in the plea agreement.⁶

It might be argued to the contrary, however, that those sentenced under plea agreements *should* be eligible for relief under Indiana Code section 35-38-1-23, because the statute on its face addresses rehabilitation shown during the period of incarceration, something that could not have been known at the time of plea bargaining and sentencing. The fact that the statute does not call for the approval or participation of the State in the process, and that it can be used in cases where the original sentence was nonsuspendible, might also favor an argument for the availability of the reduction to those sentenced by plea agreements. Finally, it might be argued that the legislature, in omitting State approval and participation from the new reduction procedure, specifically intended to allow for reduction without consideration of the State's original position regarding sentencing.⁷ Ultimate resolution these issues will rest with the appellate courts.

Another statutory provision that seems sure to foster continuing controversy is Indiana Code chapter 6-7-3, Indiana's Controlled Substance Excise Tax. These statutes are nominally tax provisions; however, their impact on criminal practice will be significant. In part, the statutes provide that any controlled substances delivered, possessed or manufactured in violation of Indiana Code chapter 35-48-4 or 21 U.S.C. §§ 841-85 are subject to the tax.⁸ The tax is assessed per gram of pure, impure, or diluted substance,⁹ and varies from ten dollars per gram to forty dollars per gram. The more commonly possessed substances, such as cocaine and marijuana, are taxed at the forty dollar per gram rate.¹⁰

The tax is to be paid when the person receives delivery of, takes possession of, or manufactures the substance.¹¹ When the tax is paid, the department of revenue is to issue evidence of payment to the taxpayer,

5. *Id.* at 114.

6. *Id.*

7. Former Sen. Edward A. Pease, who was the original author of this legislation and Chairman of the Indiana Senate Judiciary Committee, indicated by affidavit that the intent of the bill was to allow for reduction of sentences which were imposed through plea agreements. The use of such affidavits to discern legislative intent is questionable, however. *See, e.g., O'Laughlin v. Bartin*, 571 N.E.2d 1258, 1260-61 (Ind. 1991).

8. IND. CODE § 6-7-3-5 (Supp. 1992).

9. The quantity of impure or diluted substance is counted so long as there is a detectable quantity of the pure controlled substance, *Id.* § 6-7-3-6(b) (Supp. 1992).

10. *Id.* § 6-7-3-6(a)(1) (Supp. 1992).

11. *Id.* § 6-7-3-8 (Supp. 1992).

which is valid for forty-eight hours after payment is made.¹² The taxpayer must have evidence of payment in his or her possession to avoid the nonpayment penalties.¹³ Possession of the prohibited substances without having paid the tax is a class D felony, unless the criminal act giving rise to the tax liability is a class A misdemeanor.¹⁴ Failure to pay the tax also subjects the person to a 100% penalty,¹⁵ thus effectively doubling the tax amount. An assessment for the tax due under the statute is a jeopardy assessment,¹⁶ which allows for immediate seizure of assets prior to hearing.¹⁷ The statute also provides that up to ten percent of the tax amount collected may be paid to anyone providing information leading to its collection and, that if the information is provided by a law enforcement agency, the agency shall receive thirty percent of all amounts collected.¹⁸

Obviously, there has not been a rush of those seeking to pay this new tax,¹⁹ even though failure to pay results in a doubling of the assessment and possible prosecution for a class D felony, and even though the statute states that "[a] person may not be required to reveal the person's identity at the time the tax is paid."²⁰ There have been a number of assessments issued, however, and the monetary amount of the assessments has been staggering.²¹ The amount is not surprising because marijuana is taxed at forty dollars per gram plus an additional forty dollars per gram penalty for failure to pay the tax. Given the number of grams per ounce, twenty-eight, possession of just one ounce of marijuana, including stems, dirt, and any other adulterants, would result in an assessment of \$2,240.

Although collection of such massive amounts of money would seem to be problematical at best, the provision for immediate seizure and levy of assets has implications far beyond the collection of the whole amount. For example, what will be the effect on the already overburdened

12. *Id.* § 6-7-3-10 (Supp. 1992).

13. *Id.*

14. *Id.* § 6-7-3-11(b) (Supp. 1992).

15. *Id.* § 6-7-3-11(a) (Supp. 1992).

16. *Id.* § 6-7-3-13 (Supp. 1992).

17. *Id.* § 6-8.1-5-3 (Supp. 1992).

18. *Id.* § 6-7-3-16 (Supp. 1992).

19. In the first three months after the effective date of the tax, only one instance of taxpayer payment was noted by the Indiana Department of Revenue. INDIANAPOLIS STAR, Oct. 9, 1992, at B-1.

20. IND. CODE § 6-7-3-8 (Supp. 1992).

21. As of Dec. 28, 1992, assessments under the new tax totalled \$49,345,679. Telephone Interview with Commissioner's Office of the Indiana Department of Revenue (Dec. 28, 1992).

public defender system²² if those who initially have assets to retain counsel for any accompanying or resultant criminal prosecution suddenly have insufficient assets to do so? Additionally, if a person's assets have been seized, will he or she be able to effectively pursue any of the statutory remedies to contest the tax or seizure?

Other issues that may arise and be litigated in regard to the new statutory scheme include the adequacy of its protection against self-incrimination, and the impact of the Fourth Amendment of the United States Constitution and Article I, section 11 of the Indiana Constitution²³ on the use of illegally seized evidence to support the tax assessment. Challenges based on whether the tax is truly a "excise tax" rather than a criminal penalty might also be expected—especially because the tax and penalty frequently far exceed the value of the taxable item.²⁴ If the tax is considered a fine or penalty, rather than a valid tax, additional issues arise, such as: double jeopardy concerns when a criminal prosecution is also involved²⁵ and whether the possible disposition of the monies collected is proper under the Indiana Constitution.²⁶ A number of other states have similar statutes,²⁷ many of which have been upheld against constitutional challenges,²⁸ but the various statutory provisions are not identical, and it remains to be seen whether Indiana's statute will withstand the challenges expected.

While an exhaustive analysis of possible areas of contention regarding the new statutory scheme is beyond the scope of this note, it certainly appears that the excise tax will continue to foster considerable debate and litigation in the near future.

22. On Nov. 9, 1992, the Indiana Supreme Court recognized the problems with the public defender system in Indiana when it issued an order announcing the possible use of its rule-making authority to reform this system, and soliciting comments from those with an interest in the problem. Order Seeking Comment on Petition for Rule Making, Cause No. 49S00-9210-MS-822.

23. U.S. CONST. amend. IV. The Fourth Amendment to the U.S. Constitution states in relevant part that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." Article I, § 11 of the Indiana Constitution contains identical language.

24. For example, the one ounce of marijuana mentioned previously would have a tax and penalty totalling \$2,240, far exceeding its market value.

25. See, e.g., *United States v. Halper*, 490 U.S. 435 (1989).

26. Article VIII, § 2 of the Indiana Constitution provides that the Common School Fund consists of "the fines assessed for breaches of the penal laws of the State," and "all forfeitures which may accrue." IND. CONST. art. VIII, § 2.

27. Some of the other states with similar statutory schemes include Minnesota, Florida, Alabama, Colorado, Illinois, and Wisconsin.

28. See, e.g., *Briney v. State Dep't of Rev.*, 594 So.2d 120 (Ala. Civ. App. 1991), *cert. denied*, 1910 187 (Ala. 1992); *Harris v. Department of Revenue*, 563 So.2d 97 (Fla. App. 1990); *Sisson v. Triplett*, 428 N.W.2d 565 (Minn. 1988).

II. CASE LAW DECISIONS

A. Evidentiary Decisions

The Indiana appellate courts issued a number of decisions this year that will affect the admissibility of evidence in criminal trials. The Indiana Supreme Court continued to consider the adoption of a standardized system of written evidentiary rules, whether through its rule-making powers,²⁹ or through a more piecemeal, case-by-case process.³⁰ Probably the most significant 1992 decision in this regard is that rendered in *Lannan v. State*,³¹ wherein the Indiana Supreme Court rejected Indiana's long-standing use of the Depraved Sexual Instinct (DSI) rule³² as a special exception to the general prohibition against the use of other misconduct as substantive evidence to show the guilt of the accused.³³

Although upholding the defendant's conviction in *Lannan*, the court found that consideration of evidence of the defendant's depraved sexual instinct as substantive evidence of guilt in certain sex offense trials³⁴

29. Pursuant to its rule-making authority, the Indiana Supreme Court has established an ad hoc committee with representatives from throughout the State to study and propose a system of written rules of evidence. *In re* the Appointment of Supreme Court Committee On Rules Of Evidence, 602 N.E.2d 137 (Ind. 1992).

30. *See, e.g.*, *Modesitt v. State*, 578 N.E.2d 649 (Ind. 1991) (abandoning the *Patterson* rule and adopting FED. R. EVID. 801 (d)(1)(A) regarding hearsay testimony); *Thomas v. State*, 580 N.E.2d 224 (Ind. 1991) (adopting FED. R. EVID. 804(b)(3) regarding admissibility of statements against penal interest); *see also* the more recent decision in *Nunn v. State*, 601 N.E.2d 334, 338 (Ind. 1992) (adopting FED. R. EVID. 609(c) regarding impeachment of a witness with a prior conviction for which he had been pardoned).

31. 600 N.E.2d 1334 (Ind. 1992).

32. The DSI rule allowed for admission of other incidents of sexual "misconduct" under the theory that the defendant possessed a "depraved sexual instinct" which caused him or her to repeatedly commit certain kinds of aberrant sexual acts. These other acts were admissible to show that it was more likely than not that the defendant acted in conformity with his or her deviant sexual character. *See, e.g.*, *Stwalley v. State*, 534 N.E.2d 229 (Ind. 1989); *Kerlin v. State*, 265 N.E.2d 22 (Ind. 1970).

33. *Lannan*, 600 N.E.2d at 1339. The general rule against the use of other misconduct evidence prohibits the use of such evidence to show that the defendant has a propensity to engage in criminal conduct. 12 ROBERT L. MILLER, INDIANA EVIDENCE § 404.201 (1984) (Supp. 1993). There are, however, certain exceptions to this rule, such as allowing admission of prior acts that are very similar in nature and show a common scheme or plan; acts that go to the defendant's identity or motive when they are at issue; or acts that negate the defenses of mistake or accident. *See* 12 *id.* § 404.20. Additionally, such acts are not admissible if they are too remote in time, otherwise of questionable reliability, or greatly prejudicial. 12 *id.* § 404.203-04.

34. DSI evidence was most commonly used in prosecutions for child molestation and deviate conduct, but was not admissible in prosecutions for rape. 12 MILLER, *supra* note 33, § 404.216.

when the evidence would not ordinarily be admissible under the other misconduct rule, was no longer justified.³⁵ The court rejected any recidivism argument to justify the old DSI rule, noting that despite the fact drug dealers are high recidivists, evidence of other similar misconduct is not admissible in their prosecutions unless it fits within the standard exceptions to the prohibition of such evidence.³⁶ The court also rejected justification for this special rule based on one of its original premises for admission: that juries would be unlikely to believe the complaining witness's claim that such an event occurred unless it also heard evidence the defendant possessed a depraved sexual instinct. This premise was rejected because, in the present day and age, the layperson is all too familiar with allegations of child molesting.³⁷

The court therefore adopted Federal Rule of Evidence 404(b)³⁸ in its entirety,³⁹ and noted there would still be a number of instances in which DSI evidence would be admissible against the defendant under the new standard.⁴⁰

Although the court in *Lannan* decided the adoption of Fed. R. of Evid. 404(b) would be effective from the date of the decision forward,⁴¹ in another decision, it applied the rule to a case in which review was still pending. In *Pirnat v. State*,⁴² the defendant had appealed his conviction, in part based on the admission of DSI evidence. The court of appeals affirmed his conviction, and he petitioned for transfer to the Indiana Supreme Court. Because the Petition for Transfer was still pending when *Lannan* was decided, the court remanded the case to the court of appeals for reappraisal in light of the new rule.⁴³

35. *Lannan*, 600 N.E.2d at 1339.

36. *Id.* at 1336-37. See, e.g., *Conklin v. State*, 587 N.E.2d 725 (Ind. Ct. App. 1992) (finding evidence that the defendant had sold an informant drugs in the past did not fit within the exception to the prohibition of other crimes evidence, and was therefore not admissible). This holding in *Conklin* was affirmed on transfer, 596 N.E.2d 1369 (Ind. 1992), although the case was remanded in part for retrial on other grounds.

37. *Lannan*, 600 N.E.2d at 1337.

38. The rule states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

39. *Lannan*, 600 N.E.2d at 1339.

40. *Id.* at 1339-40.

41. *Id.* at 1339.

42. 600 N.E.2d 1342 (Ind. 1992).

43. *Id.* More recently, the new rule regarding DSI evidence was applied to a case

In another decision dealing with a sex offense, the court held in *Sims v. State*⁴⁴ that statements made to a sex offender counselor were inadmissible against the defendant at trial.⁴⁵ Sims was on trial for child molesting and had been convicted previously of sexual battery. As a condition of his probation for the previous conviction, Sims was required to attend and complete sex offender treatment. He was in treatment for seventeen months, and at the subsequent child molesting trial, the counselor was permitted to testify as to details related by Sims in counseling.⁴⁶ The counselor was also permitted to give his clinical observations that Sims did not respond well to treatment and fit the pattern of a "regressive pedophile."⁴⁷

Indiana Code section 25-23.6-6-1, making communications between a social worker and client privileged, was not yet in effect at the time of Sim's trial, and the communications did not fall within the physician patient privilege.⁴⁸ Nevertheless, the court still applied the privilege based on the same principle underlying the statute and the physician-patient privilege: that protecting counselor-patient communications promotes successful treatment by ensuring full disclosure between the counselor and patient.⁴⁹

The court also found admission of the counselor's testimony to be tantamount to a circumvention of the defendant's Fifth Amendment rights.⁵⁰ The court reasoned that because Sims was required to seek treatment, he probably believed his communications would be confidential, and failure to disclose potentially incriminating evidence could have subjected him to further penalty for refusing to comply with the court's order.⁵¹ Because evidence Sims was compelled to reveal was improperly used to his prejudice, the court decided he was entitled to a new trial where such evidence would be excluded.⁵²

that was tried before the rule was announced but which was still pending on appeal, although the court of appeals noted an apparent discrepancy regarding the retroactive application of *Lannan*. *Vanover v. State*, 605 N.E.2d 218, 219-20 (Ind. Ct. App. 1992). See also *Moran v. State*, 604 N.E.2d 1258, 1262 (Ind. Ct. App. 1992) (applying the *Lannan* rule to a pending appeal).

44. 601 N.E.2d 344 (Ind. 1992) This decision was also rendered on transfer of a court of appeals decision which had reversed the defendant's conviction on other grounds, *Sims v. State*, 591 N.E.2d 1044 (Ind. Ct. App. 1992).

45. *Sims*, 601 N.E.2d at 346-47.

46. *Id.* at 345.

47. *Id.*

48. *Id.* at 346-47.

49. *Id.*

50. *Id.* at 346.

51. *Id.*

52. *Id.* at 347.

The Indiana Supreme Court granted transfer of yet another court of appeals decision to discuss the admissibility of expert testimony on the issue of whether a defendant's personality profile was consistent with the formulation of the intent to commit murder. In *Byrd v. State*,⁵³ the court reversed the appellate court's decision that such testimony was admissible.⁵⁴ Byrd had sought to admit expert psychiatric testimony that his Minnesota Multiphasic Personality Inventory (MMPI) profile was inconsistent with formulating the intent to commit intentional murder. In finding such testimony properly excluded by the trial court, the Indiana Supreme Court found the proffered testimony was really character evidence.⁵⁵ The court noted that although defendants may offer evidence of their good character through their reputation, it is generally admitted through lay testimony of those who knew their reputation prior to the instant offense.⁵⁶ The court also reiterated the general rule that evidence of the defendant's character is not admissible to prove he acted in accord therewith on a particular occasion.⁵⁷

The court found that in the instant case, the character evidence was being offered through an expert who based his opinion on MMPI results and the defendant's behavior after the offense.⁵⁸ Although MMPI-based testimony has been admitted in Indiana on the issue of the defendant's potential for rehabilitation, the court found no suggestion that the MMPI is an accurate indicator of whether the defendant committed the charged offense.⁵⁹ The court held that defendants may present evidence of their good character only for particular traits relevant to the acts charged. Because the expert's testimony in this case was about the defendant's character in general, it did not constitute evidence of a particular character trait and was therefore properly excluded.⁶⁰

Despite the court's reversal on this issue, however, the cause was still remanded for retrial on an issue on which the two appellate courts agreed.⁶¹ In addition to excluding the expert testimony on character, the trial court had also excluded expert testimony concerning the consistency of the defendant's claimed memory loss with the condition of retrograde amnesia. The court of appeals found this exclusion to be erroneous.⁶²

53. 593 N.E.2d 1183 (Ind. 1992)

54. *Id.* at 1187.

55. *Id.*

56. *Id.* at 1184-85.

57. *Id.*

58. *Id.* at 1187.

59. *Id.*

60. *Id.*

61. *Id.* at 1188.

62. *Byrd v. State*, 579 N.E.2d 457, 462 (Ind. Ct. App. 1991).

The court noted that there had been no dispute as to the expert's qualifications, and although Byrd had not raised his memory loss as a defense to the charged conduct, he had attempted to use it to explain why he could not remember what happened on the night the victim was murdered. The court observed that the State had missed few opportunities to attack the defendant's credibility by questioning the validity of his claimed memory loss, and therefore the disputed testimony was related to the issue of credibility.⁶³ Although the expert's testimony tended to show the defendant was credible, the court found it did not rise to the level of prohibited direct testimony as to his credibility and should have been admitted.⁶⁴ The supreme court agreed with the court of appeals on this issue, and found remand for retrial was appropriate.⁶⁵

Other evidentiary decisions of note include *Taggart v. State*,⁶⁶ *Driver v. State*,⁶⁷ and *McKeown v. State*.⁶⁸ In *Taggart*, the supreme court found reversible error in the admission of a nontestifying codefendant's redacted confession because there was other evidence presented at trial which linked the defendant to the confession, and no limiting instruction was given.⁶⁹ In so finding, the court retroactively applied the rule announced in *Richardson v. Marsh*,⁷⁰ that admission of redacted confessions of codefendants that incriminate the defendant only through linkage by other evidence, is a violation of the right to confrontation unless there is a limiting instruction advising the jury that the confession applies only to the confessor. Because Taggart's conviction rested largely on the testimony of witnesses whose credibility was crucial, the error in admission of his codefendant's confession was held to require reversal.⁷¹

In *Driver*, the court of appeals considered the constitutional right to face-to-face confrontation previously set forth in *Brady v. State*.⁷² The court in *Driver* found this right was abrogated by the use at defendant's second trial of the recorded testimony from a witness at the first trial who died prior to the second.⁷³

Driver's first trial had been held in his absence. It was later determined that he did not knowingly, voluntarily, and intelligently waive his right to be present at that trial, and he was therefore granted a

63. *Id.*

64. *Id.*

65. *Byrd*, 593 N.E.2d at 1188.

66. 595 N.E.2d 256 (Ind. 1992).

67. 594 N.E.2d 488 (Ind. Ct. App. 1992).

68. 601 N.E.2d 462 (Ind. Ct. App. 1992).

69. *Taggart*, 595 N.E.2d at 258.

70. 481 U.S. 200 (1987).

71. *Taggart*, 595 N.E.2d at 258.

72. 575 N.E.2d 981 (Ind. 1991).

73. *Driver v. State*, 594 N.E.2d 488, 489-90 (Ind. Ct. App. 1992).

second trial.⁷⁴ At his second trial the testimony of the deceased witness was admitted against him.⁷⁵ The court of appeals held that the admission of this testimony denied the defendant his right to confrontation.⁷⁶

The importance of raising objections to preserve error was emphasized in *McKeown*, in which a relevance objection to admission of documents relating to a previous case was considered insufficient to preserve the issue for appeal.⁷⁷ *McKeown* was on trial for Operating While a Habitual Traffic Violator, and the documents in question came from a previous case where he had been charged with Operating While Suspended. The objection made was “[y]our honor, the matter that we are addressing here today happened in March of 1989. To present court documents of something that happened in 1987, I see absolutely no relevance.”⁷⁸ Although the appellate courts seem amenable to carefully considering a variety of evidentiary matters, it also seems clear from the decision in *McKeown*, as well as similar decisions, that they must be scrupulously and very specifically preserved.

B. Sentencing Issues

Another area in which the Indiana Supreme Court was particularly active was in the review of criminal sentences. Although in 1970 the Indiana Constitution was amended to give the court power to review and revise all sentences,⁷⁹ and in 1978 the Indiana Rules of Appellate Procedure added provisions for review of criminal sentences,⁸⁰ the court's use of this authority was rare until recently.⁸¹ In January, 1992, however, the supreme court issued three decisions in which it exercised the power and determined that the sentences imposed were manifestly unreasonable.

In *Wilson v. State*,⁸² the defendant had received the maximum four year sentence for a D felony theft, plus a habitual offender enhancement

74. *Id.* at 489.

75. *Id.*

76. *Id.*

77. *McKeown v. State*, 601 N.E.2d 462, 465 (Ind. Ct. App 1992).

78. *Id.*

79. IND. CONST. art. VII, § 4.

80. Rules for the Appellate Review of Sentences, *vacated* Jan. 1, 1990 (now found in IND. APP. R. 17).

81. Significant use of this power appeared to begin in 1990, when the supreme court decided *Clark v. State*, 561 N.E.2d 759 (Ind. 1990), and found that under the circumstances presented, a 30-year habitual offender enhancement violated the proportionality requirement of Article I, Section 16 of the Indiana Constitution. *Id.* at 766. The next year, in *Best v. State*, 566 N.E.2d 1027 (Ind. 1991), the court also found that while a thirty year enhancement was not entirely disproportionate, the same constitutional provision limited the enhancement to 10 years. *Id.* at 1032.

82. 583 N.E.2d 742 (Ind. 1992).

of thirty years. The supreme court granted transfer of a memorandum court of appeals decision upholding the conviction and sentence and concluded that in light of the offense and character of the offender, and the fact the prior convictions had occurred when the defendant was in his twenties and while still on parole, a thirty-four year sentence was manifestly unreasonable.⁸³ The court then remanded the cause for imposition of a two year D felony sentence for theft, plus an enhancement of only ten years for the habitual offender finding.⁸⁴

In *Saunders v. State*,⁸⁵ the supreme court also found a sentence manifestly unreasonable when it granted transfer of a court of appeals decision that had upheld a sentence for multiple counts of dealing and conspiracy to deal controlled substances.⁸⁶ In sentencing Saunders to a total of 140 years, the trial court had relied on his long history of criminal activity; the fact the crimes were committed while on parole; and the likelihood that the defendant could commit another crime.⁸⁷ The supreme court found the defendant's criminal history justified making his multiple dealing convictions consecutive as well as making his multiple conspiracy convictions consecutive, but found that also ordering the dealing and closely-related conspiracy convictions to be served consecutively to each other was manifestly unreasonable.⁸⁸ The cause was therefore remanded for imposition of a total sentence of seventy years.⁸⁹

The court had occasion to review the reasonableness of an enhanced murder sentence in *Harrington v. State*.⁹⁰ Harrington was convicted of murder and received the maximum sixty-year sentence. In imposing this enhanced sentence, the trial court relied on the following aggravators: (1) the defendant was in need of correctional or rehabilitative treatment in a penal facility, (2) imposition of a reduced sentence would depreciate the seriousness of the crime, and (3) the facts and circumstances surrounding the crime were aggravating.⁹¹ The trial court found the mitigating factors to be the defendant's lack of a criminal history and the fact he had led a law-abiding life for a substantial period of time before the crime.⁹² The supreme court held the only relevant and applicable aggravator should have been the body of the trial evidence, and that

83. *Id.* at 744.

84. *Id.*

85. 584 N.E.2d 1087 (Ind. 1992)

86. *Saunders v. State*, 562 N.E.2d 729 (Ind. Ct. App. 1991).

87. 584 N.E.2d at 1089.

88. *Id.*

89. *Id.*

90. 584 N.E.2d 558 (Ind. 1992).

91. *Id.* at 565.

92. *Id.*

this aggravator, standing in opposition to the weight of the evidence in mitigation, was clearly insufficient to support a twenty-year sentence enhancement.⁹³ The cause was therefore remanded for imposition of the presumptive forty year sentence.⁹⁴

Although the Indiana Supreme Court appears willing to consider revising those sentences it feels are unreasonable or constitutionally impermissible, such revision does not occur in every instance. The court refused to grant a petition for transfer of the court of appeals decision in *Sowell v. State*.⁹⁵ Sowell received a sentence of eleven years for prostitution. His underlying conviction was enhanced to a D felony because of his prior convictions. He received the maximum D felony sentence of three years, which was further enhanced by eight years due to his status as a D felony habitual offender.⁹⁶ The same prior felonies were used both for elevation of the offense to a D felony, and for the habitual offender determination. Sowell apparently had nine convictions for prostitution in the last ten years, plus several misdemeanor convictions. The court of appeals found that the nature of the present offense alone did not justify the enhancements but that, considering the defendant's long history of prior convictions, the enhancement was not unreasonable.⁹⁷

The appellate courts have also looked at the necessary findings for aggravation of sentences generally, as well as whether sentences should be served consecutively or concurrently. In *May v. State*,⁹⁸ the court of appeals held that an adequate explanation for enhanced sentences must include at least a list of significant aggravating and mitigating factors; specific reasons why each is aggravating and mitigating; and an evaluation and balancing of the factors.⁹⁹ Additionally, in *Ray v. State*,¹⁰⁰ the appeals court held that even where the imposition of a consecutive sentence is mandatory under Indiana Code section 35-50-1-2(b), a statement on the record of the reasons for imposing the consecutive sentence is still required.¹⁰¹

The courts also made it clear that unless a trial court is required to impose its sentence consecutively to another sentence pursuant to Indiana Code section 35-50-1-2, it lacks authority to impose the sentence

93. *Id.*

94. *Id.*

95. 590 N.E.2d 1123 (Ind. Ct. App. 1992), *trans. denied*.

96. *Id.* at 1124.

97. *Id.* at 1126.

98. 578 N.E.2d 716 (Ind. Ct. App. 1991).

99. *Id.* at 723 (citing *Robinson v. State*, 477 N.E.2d 883 (Ind. 1985)).

100. 585 N.E.2d 36 (Ind. Ct. App. 1992).

101. *Id.* at 37.

consecutively to one imposed at another time.¹⁰² In *Baskin v. State*,¹⁰³ the court relied on an earlier decision in *Kendrick v. State*,¹⁰⁴ to reaffirm that when a trial court is relying on its discretionary authority under Indiana Code section 35-50-1-2(a), it may impose consecutive sentences only where it is contemporaneously imposing two or more sentences.¹⁰⁵

The subject of habitual offender enhancements has also received attention recently. In *Stanek v. State*,¹⁰⁶ the Indiana Supreme Court held that adding the habitual offender enhancement to a sentence for the offense of operating a vehicle after driving privileges are forfeited for life (Life HTV) under Indiana Code section 9-12-3-2¹⁰⁷ was precluded because the statute under which the defendant was sentenced for a C felony was itself a habitual offender statute.¹⁰⁸ The court first noted that Title 9, Art. 12 was titled "Habitual Violators of Traffic Laws" and that the structure of the statutory scheme allowed for escalation of punishment with subsequent violations.¹⁰⁹ The statutes first provided for suspension of the person's driving privileges for up to ten years for being a Habitual Traffic Violator.¹¹⁰ The statutes then made it a class D felony to drive while so suspended, and called for the forfeiture of driving privileges for life.¹¹¹ Finally, it became a class C felony to drive after being adjudged a Life HTV.¹¹²

The court in *Stanek* found, therefore, that it was clearly the legislature's intent to make Article 12¹¹³ a habitual offender statute.¹¹⁴ The statute provides for increasingly serious penalties for violations of the HTV laws, ranging from an administrative license suspension to a class C felony conviction. The court acknowledged that the language of Indiana Code section 35-50-2-8 allows the State to seek a habitual offender enhancement for "any felony," but held that a conviction under this

102. IND. CODE § 35-50-1-2(b) (Supp. 1992) (requiring the imposition of consecutive sentences when the defendant commits a crime while on parole, probation, bond, or while still serving a term of imprisonment for another crime.)

103. 586 N.E.2d 938 (Ind. Ct. App. 1992).

104. 529 N.E.2d 1311 (Ind. 1988).

105. *Baskin*, 586 N.E.2d at 939. Recent decisions dealing with the order of imposition of consecutive sentences in situations where a violation of probation is involved are *Meniffee v. State*, 601 N.E.2d 359 (Ind. Ct. App. 1992); *Meniffee v. State*, 600 N.E.2d 967 (Ind. Ct. App. 1992); and *Harris v. State*, 598 N.E.2d 639 (Ind. Ct. App. 1992).

106. 603 N.E.2d 152 (Ind. 1992).

107. IND. CODE § 9-12-3-2, *repealed and replaced by id.* § 9-30-10-17 (Supp. 1992).

108. *Stanek*, 603 N.E.2d at 153-54.

109. *Id.* at 153.

110. IND. CODE § 9-12-2-1, *repealed and replaced by id.* § 9-30-10-5 (Supp. 1992).

111. *Id.* § 9-12-3-1(b), *repealed and replaced by id.* § 9-30-10-16(b) (Supp. 1992).

112. *Id.* § 9-12-3-2, *repealed and replaced by id.* § 9-30-10-17 (Supp. 1992).

113. Now Article 30.

114. *Stanek v. State*, 603 N.E.2d 152, 153 (Ind. 1992).

section could not be subject to further enhancement under the habitual offender statute because it is a discreet, separate, and independent habitual offender statute.¹¹⁵ It will be interesting to see if this type of analysis is applied in the future to cases involving other progressive punishment statutes.

The problems involved in construing and assessing the validity of various convictions in the habitual offender context were also dealt with by the courts. In *Johnson v. State*,¹¹⁶ the supreme court held that where the underlying, enhanced D felony was committed after September 1, 1985, the Savings Clause in the enacting legislation for the D felony habitual offender statute¹¹⁷ did not apply and defendants could not be sentenced under the regular habitual offender statute.¹¹⁸ For the Savings Clause to allow a defendant with only D felony convictions to be sentenced under the regular habitual offender enhancement, both the enhanced felony and the prior felonies must have been committed prior to September 1, 1985.¹¹⁹

In *Abron v. State*,¹²⁰ however, the court of appeals held that a regular habitual offender enhancement is appropriate if any of the convictions used, (i.e., prior or present convictions), is greater than a class D felony.¹²¹ The court rejected the trial court's conclusion that the statute required at least one of the *prior* convictions be greater than a D felony to make the defendant eligible for the regular habitual offender enhancement.¹²²

Some of the difficulties arising from sentencing under the habitual offender statutes were summarized most recently in *Broshears v. State*,¹²³ where the court found it was error to deny the defendant's request for a special verdict form in the habitual offender proceedings against him. The court found that where more than two prior convictions are alleged, and depending upon which prior convictions are relied on for enhancement, the defendant could be subject to either a regular¹²⁴ or D felony¹²⁵ habitual offender enhancement, a special verdict form must be used if requested.¹²⁶ The court noted that it is permissible for the State to allege

115. *Id.* at 153-54.

116. 593 N.E.2d 1181 (Ind. 1992), *rev'g* 585 N.E.2d 1352 (Ind. Ct. App. 1992).

117. IND. CODE § 35-50-2-7.1 (1992).

118. *Johnson*, 593 N.E.2d at 1182 (referring to IND. CODE § 35-50-2-8 (1976)).

119. *Id.*

120. 591 N.E.2d 634 (Ind. Ct. App. 1992).

121. *Id.* at 638-39.

122. *Id.* at 638-40.

123. 604 N.E.2d 639 (Ind. Ct. App. 1992).

124. IND. CODE § 35-50-2-8, *amended by id.* § 35-50-2-8 (Supp. 1992).

125. *Id.* § 35-50-2-7.1, *amended by id.* § 35-50-2-7.1 (Supp. 1992).

126. *Broshears*, 604 N.E.2d at 644.

more than the required two prior convictions, but problems have arisen where a general verdict form has been used and one of the prior convictions is later found to have been ineligible to be counted.¹²⁷

In *Broshears*' case, six prior felony convictions were alleged—two of which were class D felonies. His underlying charge was also a D felony. One of the prior convictions was inappropriate for consideration, and it was also possible the jury had relied upon the prior D felony convictions for enhancement. If the latter had been the case, *Broshears* would have been eligible only for a D felony habitual enhancement. The court found that because of the situation presented, it was error to deny the defendant's request for a special verdict form. The court noted that despite their general abolition, special verdict forms are allowed in comparative fault cases,¹²⁸ and held that the same rationale for their use in comparative fault circumstances should apply to habitual offender proceedings in the defendant's circumstances.¹²⁹ The court then set forth, verbatim, what it considered a proper verdict form for this kind of case.¹³⁰ Although *Broshears* involved a situation in which both enhancement under two different habitual offender statutes was possible and an invalid conviction was involved, the court's analysis might well apply to any situation where multiple prior convictions are alleged.¹³¹

C. Right to Counsel and Other Assistance

In *Scott v. State*,¹³² the Indiana Supreme Court granted transfer of a court of appeals memorandum decision for the specific purpose of outlining the relevant factors trial courts should use in determining whether indigent defendants are entitled to various kinds of expert assistance at public expense. After first discussing the long-standing history of the protection of indigent defendants' rights to counsel and assistance in Indiana,¹³³ the court went on to note that appointment of expert assistance to those defendants is within the trial court's discretion,

127. *Id.* at 643. Because it is impossible to know whether the proper prior convictions were used for the enhancement under those circumstances, the enhancements have been overturned. See, e.g., *Nash v. State*, 545 N.E.2d 566 (Ind. 1989).

128. IND. CODE § 34-4-33-6, amended by *id.* § 34-4-33-6 (Supp. 1992).

129. *Broshears*, 604 N.E.2d at 644.

130. *Id.* at 645.

131. When a prior conviction is later determined to be ineligible as an enhancer, a special verdict form is necessary to eliminate questions of whether that conviction was relied on for the verdict.

132. 593 N.E.2d 198 (Ind. 1992).

133. *Id.* at 199. See also *Bardonner v. State*, 587 N.E.2d 1353 (Ind. Ct. App. 1992), *trans. denied*, in which the court of appeals said, "[w]e go on record here stating that criminal defense attorneys and public defenders perform a valuable and highly respected service to the judicial process." *Id.* at 1361, n.8.

and that the defendant bears the burden of demonstrating his or her need.¹³⁴

The appointment of such experts is subject to review for abuse of discretion, however.¹³⁵ While noting the standard for appointment is case sensitive, the court set out a number of factors for the trial courts to consider: (1) the presence of a specific showing of how the expert would benefit the defendant, (2) whether the proposed expert's services would bear on an issue which is normally considered to be one where expert testimony would be necessary, (3) the probability that the proposed expert could demonstrate that which the defendant desires, (4) whether the expert services would go toward answering a substantial (versus a merely ancillary) question, (5) how technical the evidence is, (6) how serious the charge and penalty facing the defendant are, (7) how complex the case is, (8) the cost of the requested services, (9) the timeliness of the defendant's request, and (10) the likelihood of the admissibility of the expert's testimony at trial.¹³⁶ In apparent consideration of maintaining at least some degree of parity between the State and those defendants without resources to fund their defense, the court also stated:

[i]f the State is relying upon an expert and expending substantial resources on the case and defendants with monetary resources probably would choose to hire an expert, the trial court should strongly consider such an appointment to assist defense counsel in investigating the same matters, cross-examining the State's expert, or providing testimony,¹³⁷

The stage for *Scott* appeared to have been set in some part by the court's earlier decision in a death penalty case, *Castor v. State*,¹³⁸ in which the court held it was error to deny the defendant's request for a psychologist to assist with the penalty phase of his trial.¹³⁹ Castor's pretrial motions for expert assistance stated that defense counsel had consulted with a psychologist who posited that the defendant might have been under the influence of "extreme mental or emotional disturbance" when the alleged acts were committed (one of the statutory factors which may be used in mitigation of the death penalty).¹⁴⁰ In view of these circumstances, the supreme court found it was incumbent upon the trial court to allow Castor the appropriate resources to develop this possible

134. *Scott*, 593 N.E.2d at 200.

135. *Id.*

136. *Id.* at 200-01.

137. *Id.* at 201.

138. 587 N.E.2d 1281 (Ind. 1992).

139. *Id.* at 1288.

140. IND. CODE § 35-50-2-9(c)(2), amended by *id.* § 35-30-2-9(c)(2) (1992).

mitigation evidence, and its failure to do so was an abuse of discretion.¹⁴¹

In an earlier decision, however, the court found the failure to grant a defendant's request for funds for an eyewitness identification expert was not prejudicial enough to require reversal of his conviction. Such a request was denied by the trial court in *Hopkins v. State*.¹⁴² In *Hopkins*, there was some question about the confidence of one of four eyewitnesses in her identification of the defendant. The defendant requested \$260 to hire an identification expert to cross-examine this witness and testify regarding identification in general. Although finding insufficient prejudice in denial of the request to warrant reversal, the court did acknowledge that the weight of authority favored the admission of expert testimony under similar circumstances.¹⁴³

In another case dealing with eyewitness identification, *Clark v. State*,¹⁴⁴ the court of appeals held that conducting a hearing on a motion to suppress the identification, in the absence of defense counsel, was a denial of the defendant's right to counsel.¹⁴⁵ The court noted this type of hearing offered an opportunity for an effective defense to be seized, and was a critical stage of the proceedings where the defendant confronted both the intricacies of the law and the advocacy of the prosecutor.¹⁴⁶

The defendant's right to counsel was also found to have been denied in both *Boesel v. State*,¹⁴⁷ and *Carr v. State*.¹⁴⁸ In *Boesel*, the defendant's third appointed counsel moved to withdraw after two months because Boesel did not keep his appointments. This motion was denied, and when Boesel failed to appear for trial two weeks later, the court denied a second motion to withdraw by defense counsel.¹⁴⁹ After completing jury selection and denying a defense motion for continuance, the trial court did grant counsel's third motion to withdraw.¹⁵⁰ The trial then proceeded without the defendant or his counsel present. The court of appeals found the trial court had abused its discretion in allowing defense

141. *Castor*, 587 N.E.2d at 1288. However, the court rejected the defendant's argument, raised for the first time on appeal, that this denial of expert assistance affected the guilt-innocence phase of the trial as well. *Id.* The defendant did not claim insanity at the time of the offense or his incompetence to stand trial. The court found the use of the expert in this regard was exploratory only, and therefore denial of assistance was not improper. *Id.* (relying on *Hough v. State*, 560 N.E.2d 511, 516 (Ind. 1990)).

142. 582 N.E.2d 345, 352-53 (Ind. 1991).

143. *Id.* at 353.

144. 577 N.E.2d 620 (Ind. Ct. App. 1991).

145. *Id.* at 621-22.

146. *Id.*

147. 596 N.E.2d 261 (Ind. Ct. App. 1992).

148. 591 N.E.2d 640 (Ind. Ct. App. 1992).

149. 596 N.E.2d at 262.

150. *Id.*

counsel to withdraw after the jury was impanelled, and that proceeding to trial in this fashion denied the defendant's right to counsel under both the United States and Indiana Constitutions.¹⁵¹ The court noted the right to counsel extends to indigent defendants and is relinquished only by a knowing, voluntary, and intelligent waiver, not by merely failing to appear for trial.¹⁵²

In *Carr*, the court found that the defendant's failure to appear at trial did not constitute either a waiver of the right to counsel, or a waiver of his right to a jury trial.¹⁵³ Carr originally requested a jury trial, which was subsequently reset by the trial court on its own motion. When neither Carr nor defense counsel appeared for the new setting, the court discharged the jury and held a bench trial after finding that Carr had voluntarily absented himself. After Carr eventually appeared, the court advised him of his conviction, appointed counsel, and proceeded with the habitual offender portion of the proceedings against him. At that time, Carr was advised that his earlier absence constituted a waiver of his right to a jury for the earlier trial as well as the habitual offender proceedings.¹⁵⁴ The court of appeals found that because the record did not support the trial court's finding that Carr had waived his jury trial rights, the trial court had erred in holding both proceedings without a jury.¹⁵⁵ The appellate court also found Carr's absence from trial did not act as a waiver of his constitutional right to counsel, and that he had been entitled to both counsel and a jury in all proceedings.¹⁵⁶

An adequate waiver of the jury trial right was found in *Goody v. State*,¹⁵⁷ however. In *Goody*, even though the defendant did not personally speak, the record reflected his concurrence in the prosecution's waiver of a jury.¹⁵⁸ Additionally, in *Leonard v. State*,¹⁵⁹ the Indiana Supreme Court held that the guidelines set forth in *Dowell v. State*¹⁶⁰ to determine a knowing, intelligent and voluntary waiver of the right to counsel, although appropriate and preferable, are not mandatory so long as they are adequate under controlling precedent.¹⁶¹

151. *Id.*

152. *Id.*

153. *Carr v. State*, 591 N.E.2d 640, 641-42 (Ind. Ct. App. 1992).

154. *Id.* at 641.

155. *Id.*

156. *Id.* at 642.

157. 587 N.E.2d 172, 173 (Ind. Ct. App. 1992)

158. *Id.* at 172-73.

159. 579 N.E.2d 1294 (Ind. 1991) (on transfer from 573 N.E.2d 463 (Ind. Ct. App. 1991)).

160. 557 N.E.2d 1063 (Ind. Ct. App. 1990).

161. 579 N.E.2d at 1296.

The related issue of the waiver of a defendant's right to be present at trial was discussed in several cases in 1992. In *Miller v. State*,¹⁶² in contrast to several prior recent decisions,¹⁶³ the circumstantial evidence of the defendant's knowledge of the trial date was found sufficient to show a knowing and voluntary waiver of his right to be present.¹⁶⁴ It was also held in *Jenkins v. State*¹⁶⁵ that the defendant, by becoming intoxicated, effectively waived his right to be present on the second day of trial.¹⁶⁶

D. Substantive Law

Several decisions dealing with sexually related crimes were issued in 1992. The interplay of the various statutes dealing with prostitution-related offenses was considered in *State v. Hartman*,¹⁶⁷ in which the Indiana Supreme Court held that a lone prostitute who directed someone to his or her place of business could not be convicted for promoting prostitution under Indiana Code section 35-45-4-4.¹⁶⁸ The court noted that three statutes, Indiana Code section§ 35-45-4-2, 3, and 4 proscribe the activities of prostitutes, their patrons, and pimps, respectively.¹⁶⁹ Hartman was charged under the promotion statute because he called a potential patron and gave him directions to his home, where he allegedly fondled the patron. While acknowledging that the plain meaning of the word "direct," as used in the promoting statute, was consistent with the defendant's action, the court found that interpretation to be inconsistent with the legislative intent that Indiana Code section 35-45-4-4 be applied only to the conduct of a third party in facilitating prostitution.¹⁷⁰ The court also discussed the fact that the legislature did not intend, in

162. 593 N.E.2d 1247 (Ind. Ct. App. 1992).

163. See, e.g., *McCaffrey v. State*, 577 N.E.2d 617 (Ind. Ct. App. 1991) (finding that evidence, including defendant's absence at trial despite actual knowledge of the trial date, was insufficient to constitute a waiver); *Reel v. State*, 567 N.E.2d 845 (Ind. Ct. App. 1991); *Fennell v. State*, 492 N.E.2d 297 (Ind. 1986) (finding evidence insufficient to constitute a waiver).

164. 593 N.E.2d at 1249-51.

165. 596 N.E.2d 283 (Ind. Ct. App. 1992).

166. *Id.* at 285.

167. 602 N.E.2d 1011 (Ind. 1992).

168. *Id.* at 1013-14 (reversing 594 N.E.2d 830 (Ind. Ct. App. 1992), which had affirmed the defendant's conviction).

169. *Id.* at 1012-13.

170. *Id.* at 1013 (relying on comments of the Criminal Law Study Commission, included in its proposed final draft of the 1976 penal code revision, to ascertain legislative intent).

these circumstances, to give prosecutors the discretion to charge one of several different offenses with different penalties.¹⁷¹ It will be interesting to see if the same rationale will be used in ruling on other statutory schemes which arguably allow for similar discretion.

In a decision dealing with rape, the supreme court, in *Jones v. State*,¹⁷² held that where there was no evidence of the use of force or threats to encourage intercourse, the evidence was insufficient to support the conviction for rape.¹⁷³ Although the defendant did not have a weapon, and the alleged victim had refused the defendant's request for sex twice before finally "just letting him have it," she did not think to hit him or cry out for help or yell.¹⁷⁴ The court found that although the alleged victim said she was afraid to yell for help, there was no evidence that her fear was occasioned by threats or force from the defendant.¹⁷⁵ The court concluded that although the force necessary to compel intercourse "by force or imminent threat of force" does not have to be physical and may be implied from the circumstances, the evidence in this case could not adequately lead to an inference of constructive or implied force.¹⁷⁶

A comparable force was also found missing in *Scott-Gordon v. State*.¹⁷⁷ In *Scott-Gordon*, the supreme court found evidence that the defendant approached the victim from behind and grabbed his buttocks, but stepped away after the victim hit him, was insufficient to support a conviction for sexual battery.¹⁷⁸ Not all touching intended to arouse or satisfy sexual desires is sexual battery, only such touching that includes an element of force. While acknowledging that the defendant's touching may have constituted battery, the court found it did not support a conviction for sexual battery.¹⁷⁹

The refusal of an instruction on sexual battery as a lesser-included offense (LIO) of child molesting was found to be error in *Pedrick v. State*.¹⁸⁰ The charging information did not preclude a battery conviction, and the court found there was a serious evidentiary dispute as to the

171. *Id.*

172. 589 N.E.2d 241 (Ind. 1992).

173. *Id.* at 243.

174. *Id.*

175. *Id.*

176. *Id.* at 242-43. Compare, *Hughes v. State*, 600 N.E.2d 130, 132 (Ind. Ct. App. 1992) (holding that sexual touching, positioning, or attempting to remove clothing is not necessary to support a conviction for attempted rape, so long as there is a substantial step of some type).

177. 579 N.E.2d 602 (Ind. 1991).

178. *Id.* at 604.

179. *Id.*

180. 593 N.E.2d 1213, 1217 (Ind. Ct. App. 1992).

element distinguishing the two offenses.¹⁸¹ All of the actions alleged against Pedrick involved touching outside of clothing, and the defendant denied any intent to arouse or satisfy sexual desires. The court found that although battery is not an inherently LIO of child molesting, the information alleging performance or submission to touching or fondling did contain the elements of battery.¹⁸² Additionally, the court found there was a serious dispute as to whether there was a sexually motivated intent—the element distinguishing child molesting from battery—and therefore held the refusal of the LIO instruction was error.¹⁸³

Two other decisions dealing with child molesting offenses also bear mention. In *Barger v. State*¹⁸⁴ the court held that when it is difficult to prove whether the victim was eleven or twelve at the time of the offense, it is sufficient to charge and convict the defendant of the lesser, class D felony, child molesting, because the victim is clearly under the age of sixteen.¹⁸⁵

In *Acuna v. State*,¹⁸⁶ the court held where a single act of intercourse underlay convictions for both incest and child molesting by intercourse, double jeopardy concerns prohibit multiple convictions.¹⁸⁷ The *Acuna* decision is especially noteworthy because it contains an extensive discussion of the concept of merger in sex offense cases and reviews prior case law. Additionally, in a footnote, the court noted that the decision in *Ellis v. State*¹⁸⁸ appeared to impliedly overrule an earlier decision in *Snider v. State*¹⁸⁹ that stood for the proposition that one act of intercourse *could* support a conviction for both child molesting and incest.¹⁹⁰

The intent issue in murder and attempted murder cases also received scrutiny recently. In *Nunn v. State*¹⁹¹ the court held that evidence revealing that the defendant and victim did not exchange words, that the defendant struck the victim once in the back of the neck with his hand and then walked away, and that the victim died from the unusual injury of severance of her cerebral artery was insufficient to support a conviction for murder.¹⁹² The court found the crucial question was whether the

181. *Id.* at 1216-17.

182. *Id.* at 1217.

183. *Id.*

184. 587 N.E.2d 1304 (Ind. 1992) (on transfer of decision at 576 N.E.2d 621 (Ind. Ct. App. 1991), which had reversed the defendant's conviction).

185. *Id.* at 1307-08.

186. 581 N.E.2d 961 (Ind. Ct. App. 1991).

187. *Id.* at 965.

188. 528 N.E.2d 60 (Ind. 1988).

189. 412 N.E.2d 230 (Ind. 1980).

190. 581 N.E.2d at 965, n.5.

191. 601 N.E.2d 334 (Ind. 1992).

192. *Id.* at 339.

defendant acted with the requisite intent, to knowingly kill another human being, when he struck the victim.¹⁹³ The court answered this question in the negative by finding the evidence presented was sufficient only to support a conviction for involuntary manslaughter.¹⁹⁴ The court then exercised its authority to order modification of the conviction to the lesser included offense.¹⁹⁵ This decision was based on the insufficiency of the evidence, but its discussion of the requisite intent for murder may prompt future litigation based on the type of instruction required in murder prosecutions.¹⁹⁶

Several recent decisions have ruled on various issues involved in drug offense prosecutions. It has become clear, for example, that the mere possession of cocaine, packaged in multiple small bags, will not be sufficient to sustain a conviction for possession of cocaine with intent to deliver. In *Johnson v. State*,¹⁹⁷ evidence that the defendant possessed 1.76 grams of cocaine packaged in small packets was found insufficient for conviction, because the defendant was known to be a frequent drug user and there was no other circumstantial evidence to support an intention to sell the drugs. The court determined that given the defendant's own drug use, the amount of cocaine found supported personal consumption, rather than intent to sell.¹⁹⁸

A similar result was reached in *Isom v. State*,¹⁹⁹ in which evidence that the defendant possessed only 0.88 grams of cocaine, even though packaged in ten separate baggies, was found insufficient to support the dealing charge.²⁰⁰ It appears that despite the war on drugs, the courts will be hesitant to find defendants guilty of the high penalty dealing

193. *Id.*

194. *Id.* But see *Green v. State*, 587 N.E.2d 1314 (Ind. 1992) (finding circumstantial evidence sufficient to support an inference that the defendant have a motive to kill the victim).

195. *Nunn*, 601 N.E.2d at 339-40.

196. The issue of instructions on intent in attempted murder prosecutions was also addressed extensively this year. See, e.g., *Brown v. State*, 587 N.E.2d 693, 695-96 (Ind. Ct. App. 1992) (finding the failure to include a requirement for specific intent to kill in an attempted murder instruction was fundamental error, and applying the requirement announced in *Smith v. State*, 459 N.E.2d 355 (Ind. 1984) and *Abdul-Wadood v. State*, 521 N.E.2d 1299 (Ind. 1988), retroactively). See also *Woodcox v. State*, 591 N.E.2d 1019, 1022-23 (Ind. 1992). But see *Allen v. State*, 575 N.E.2d 615, 616-17 (Ind. 1991) (finding the error in the instruction not to be fundamental).

197. 594 N.E.2d 817 (Ind. Ct. App. 1992).

198. *Id.* at 817-18 ("The facts . . . reflect that Johnson had 1.76 grams of cocaine in his possession [and] . . . the cocaine was packaged consistent with "sale on the street." . . . This inference, however, is diluted, if not destroyed, by the inverse proposition that the cocaine was packaged consistent with "having been bought on the street."").

199. 589 N.E.2d 245 (Ind. Ct. App. 1992).

200. *Id.* at 247-48.

charges where the amount of drug possessed is consistent with personal consumption.²⁰¹

Convictions for maintaining and visiting a common nuisance were also attacked recently. The requirement of "knowledge of selling" under Indiana Code section 35-48-4-13(b)(2)²⁰² was strictly enforced in *Holmes v. State*.²⁰³ The court held that absent evidence the defendant knew cocaine was being sold in her house, the presence of a large volume of drug paraphernalia and guns, the fact Holmes' close relatives sold drugs from the home, and the fact she was present at the time of the sale, were all insufficient to support a conviction for maintaining a common nuisance.²⁰⁴

Knowledge was also crucial to the decision in *Braster v. State*,²⁰⁵ in which Braster's conviction for visiting a common nuisance was overturned because the evidence was insufficient to show he knew the residence was involved in the unlawful use of controlled substances.²⁰⁶ Although drug paraphernalia was present in the lower level of the home and the defendant was found in the kitchen on that level, the fact that the paraphernalia was in plain view of the police officers did not indicate that it was in plain view of the defendant, and therefore did not show the requisite knowledge on the defendant's part.²⁰⁷

Two additional decisions that found error in the failure to give lesser-included offense (LIO) instructions were also significant this year. Such error was found in *Aschliman v. State*²⁰⁸ in the trial court's refusal to give an instruction on conversion as a LIO of theft.²⁰⁹ This decision appears to hold that where there is evidence to support commission of a LIO which is inherently included in the greater offense, the State can never preclude a LIO instruction if it is requested.²¹⁰ The decision also

201. In contrast, however, decisions uniformly upheld convictions for drug dealing within 1,000 feet of a school, despite various challenges. *See, e.g., Reynolds/Herr v. State*, 582 N.E.2d 833, 838 (Ind. Ct. App. 1991) (upholding the constitutionality of IND. CODE §§ 35-48-4-1 and 35-48-4-6 in the face of equal protection, vagueness, and overbreadth challenges). *See also Bailey v. State*, 603 N.E.2d 1376 (Ind. Ct. App. 1992), and *Steelman v. State*, 602 N.E.2d 152 (Ind. Ct. App. 1992) rejecting other attacks on these statutes and convictions.

202. IND. CODE § 35-48-4-13(b)(2) (1977), *amended by id.* § 35-48-4-13(b)(2) (1991).

203. 583 N.E.2d 180 (Ind. Ct. App. 1991).

204. *Id.* at 182-84.

205. 596 N.E.2d 278 (Ind. Ct. App. 1992).

206. *Id.* at 280.

207. *Id.* at 279. The court also noted there was no evidence paraphernalia was found in the kitchen. *Id.*

208. 589 N.E.2d 1160 (Ind. 1992), *rev'g*, 578 N.E.2d 759 (Ind. Ct. App. 1991).

209. *Id.* at 1162.

210. *Id.*

appears to impliedly overrule an earlier decision in *Compton v. State*²¹¹ on this issue.²¹²

In *Sandilla v. State*,²¹³ the defendants were charged with involuntary manslaughter by alleging that they killed the victim while attempting to commit the crime of battery. The trial court refused their tendered instruction on battery as a LIO.²¹⁴ The court of appeals first found the wording of the charging information and statute defining the crime rendered battery an inherently LIO of involuntary manslaughter.²¹⁵ It then held that to justify a LIO instruction on battery in a voluntary manslaughter case, there must be a serious evidentiary dispute as to either whether the victim actually died, or whether the battery was the cause of the victim's death.²¹⁶ The court determined in this case that there was such a dispute as to whether the beating by the defendants actually caused the victim's death. Therefore, failure to give the LIO on battery was error.²¹⁷ In so ruling, the court relied extensively on *Aschliman*.²¹⁸

Other recent decisions dealing with substantive offenses also merit brief note. In *Wagerman v. State*,²¹⁹ the court held that knowledge of alteration is a necessary element of the crime of possession of a handgun with an altered serial number under Indiana Code section 35-47-2-18.²²⁰ Although the statute does not contain a specific *mens rea* element, the court utilized the presumption favoring the inclusion of an intent element, due in large part to the seriousness of the sanctions for commission of the offense.²²¹ The court also stated in a footnote that the analysis and holding of this decision would apply equally to other crimes under Indiana Code section 35-37-2-18.²²²

In *Alexander v. State*,²²³ firefighters were not excluded from the statutory²²⁴ definition "bodily injury or serious bodily injury to any

211. 465 N.E.2d 711 (Ind. 1984).

212. Although *Compton* was not mentioned by the court, its holding that the defendant could not have been entitled to, *inter alia*, an instruction on criminal conversion as a LIO of theft because the State had drafted its information to preclude such instruction, seems to be in direct conflict with the holding in *Aschliman*.

213. 603 N.E.2d 1384 (Ind. Ct. App. 1992).

214. *Id.* at 1386.

215. *Id.* Furthermore, the court of appeals noted that IND. CODE § 35-42-1-4(3) defines involuntary manslaughter as killing another human being while committing or attempting to commit battery.

216. 603 N.E.2d at 1387.

217. *Id.* at 1388.

218. *Id.* at 1386-88.

219. 597 N.E.2d 13 (Ind. Ct. App. 1992).

220. *Id.* at 16.

221. *Id.*

222. *Id.* at 16 n.3.

223. 600 N.E.2d 549 (Ind. Ct. App. 1992).

224. IND. CODE § 35-43-1-1(a) (1977).

person other than the defendant" that elevates arson to a class A felony.²²⁵ The court rejected the defendant's argument that because firefighters respond to nearly every fire and endanger their lives in every arson, including them within the definition of "any person" would render other sections of the statute meaningless. The court looked to the plain and ordinary meaning of the words, and found that the defendant's interpretation would require finding firefighters do not fall in the common definition of "persons" or "humans."²²⁶

In another arson case, *Williams v. State*,²²⁷ it was held that smoke and soot damage to the wall of the basement of a house was sufficient to constitute "damages" under the same statute,²²⁸ and therefore the defendant was properly convicted of arson.²²⁹ Again, the court relied in part on the plain and ordinary meaning of the statutory language to reach its definition of "damages."²³⁰

E. Procedural and Trial Issues

A number of decisions were rendered in 1992 which dealt with various procedural or trial-related issues. In *Sewell v. State*,²³¹ the court considered the implications of *Brady v. Maryland*²³² regarding exculpatory evidence, and held that due process concerns entitled a defendant pursuing postconviction relief to obtain the State's rape kit for laboratory testing and possible DNA analysis.²³³ Sewell was convicted of rape in 1981, when DNA comparisons were unavailable. In 1990 he filed discovery motions seeking the previously prepared rape kit and laboratory records to subject them to further analysis.

Although noting that defendants may waive pretrial discovery rights by not exercising them and ordinarily a second opportunity to discover the same evidence would be precluded, the court found that because DNA comparisons were unavailable at the time of the original trial, finding a waiver on the part of the defendant would be equivalent to requiring him to anticipate forensic scientific advances.²³⁴ After reviewing

225. 600 N.E.2d at 553.

226. *Id.*

227. 600 N.E.2d 962 (Ind. Ct. App. 1992).

228. IND. CODE § 35-43-1-1(a) (1976) applies to a "person who, by means of fire or explosive, knowingly or intentionally damages: (1) a dwelling of another," but the statute does not define the term "damages."

229. 600 N.E.2d at 964-65.

230. *Id.*

231. 592 N.E.2d 705 (Ind. Ct. App. 1992), *trans. denied*.

232. 373 U.S. 83 (1963).

233. 592 N.E.2d at 707-08.

234. *Id.* at 707.

the applicability of *Brady* to posttrial proceedings during which exculpatory evidence is first discovered, the court stated,

[a]dvances in technology may yield potential for exculpation where none previously existed. The primary goals of the court when confronted with a request for the use of a particular discovery device are the facilitation of the administration of justice and the promotion of the orderly ascertainment of the truth.²³⁵

The court then found under the circumstances presented, permitting Sewell's requested discovery would meet those ends.²³⁶ No other cases dealing with this type of issue were forthcoming in 1992, but it would appear that the decision may spawn related creative arguments in the future.

Although a number of decisions were issued in the area of the right to a speedy trial and commitment, three are of particular note. In *In re Woods v. State*,²³⁷ the Indiana Supreme Court held that a trial court loses jurisdiction over the defendant for purposes of committing him to prison, if it does not act within a reasonable time after the defendant's conviction is affirmed on appeal.²³⁸ In this case, the defendant appealed his conviction, but it was upheld, and nothing was done to initiate his commitment until five and one-half years after the appellate decision was certified. The court applied the principle it had earlier stated in *Taylor v. State*,²³⁹ that "[a]n American citizen is entitled to live without a Damocles sword hanging over his head,"²⁴⁰ and found the trial court had waited too long to execute the defendant's sentence.²⁴¹

In *Crosby v. State*,²⁴² the court recognized that the State's failure to provide timely discovery responses and its extremely late amendment of the charges, could place a defendant in the untenable position of either waiving his right to a speedy trial or proceeding to trial without adequate preparation.²⁴³ Crosby had filed a speedy trial request pursuant to Criminal Rule 4(B). Just before trial, the State amended the information to add several additional counts and belatedly furnished Crosby with voluminous discovery. Although the trial court granted the defen-

235. *Id.* at 708.

236. *Id.*

237. 583 N.E.2d 1211 (Ind. 1992).

238. *Id.* at 1212-13.

239. 120 N.E.2d 165 (Ind. 1954).

240. *Woods* 583 N.E.2d at 1212 (citing *Taylor*, 120 N.E.2d at 167).

241. *Id.* at 1212-13.

242. 597 N.E.2d 984 (Ind. Ct. App. 1992).

243. *Id.* at 988-89.

dant's request to have his necessary continuance charged to the State, when the new trial date arrived, the trial was postponed to a date outside of the seventy day limit due to a congested court calendar.²⁴⁴ The court of appeals held that the trial court's denial of Crosby's subsequent motion for discharge was erroneous because at the time of the continuance necessitated by the State's actions, the calendar was not crowded.²⁴⁵ This decision contains an extensive analysis of speedy trial issues and the problems occurring when discovery deadlines are not followed and late amendments to charges are allowed. It is one of the few recent decisions which recognizes that these actions may place defendants in very difficult positions, and is likely to be cited often by defense counsel.

One other decision of brief note was rendered in *State v. Roth*²⁴⁶ in which the court held that when a defendant requests a speedy trial under Crim. R. 4(B) following a mistrial or reversal on appeal, he is entitled to discharge if not brought to trial within seventy days.²⁴⁷ The court interpreted *Young v. State*²⁴⁸ to mandate that where a specific request is made under Crim. R. 4(B) upon retrial, the time limits of the rule apply—even though the other provisions of Crim. R. 4 require only that the defendant be retried within a reasonable time in this context.²⁴⁹

F. Search and Seizure

Although no search and seizure cases in 1992 established new law, several decisions indicated that the Indiana appellate courts may be maintaining a more protective view of Fourth Amendment rights than the one currently held by the United States Supreme Court. In both *Everroad v. State*²⁵⁰ and *Dolliver v. State*²⁵¹ the Indiana Supreme Court found the affidavits used to obtain search warrants were inadequate and based on insufficiently corroborated hearsay, and refused to apply the "good faith" exception to preserve the validity of the searches.²⁵² In

244. *Id.* at 986.

245. *Id.* at 988.

246. 585 N.E.2d 717 (Ind. Ct. App. 1992).

247. *Id.* at 718-19.

248. 482 N.E.2d 246 (Ind. 1985). This decision held that after a mistrial, the defendant must make a renewed request for speedy trial under C.R. 4(B). *Id.* at 249.

249. 585 N.E.2d at 718-19.

250. 590 N.E.2d 567 (Ind. 1992) (on transfer from 570 N.E.2d 38 (Ind. Ct. App. 1991)).

251. 598 N.E.2d 525 (Ind. 1992).

252. *Everroad*, 590 N.E.2d at 570-71, and *Dolliver*, 598 N.E.2d at 528-29. *But see* *Wood v. State*, 592 N.E.2d 740, 743-45 (Ind. Ct. App. 1992) (holding that a search warrant was not defective, despite an allegedly defective affidavit).

Terry v. State,²⁵³ the court held that the trial court erred in failing to suppress evidence found in an alleged "inventory" search, because this second inventory search by Indiana officials occurred after such a search had already been conducted by officials in the state discovering the defendant's car.²⁵⁴ The court found the later search was really an investigatory search, not a routine inventory search.²⁵⁵ The trial court had ruled that a search warrant obtained was invalid,²⁵⁶ and the State did not assert the "good faith" exception to an invalid warrant. Therefore the court of appeals ruled that the failure to suppress the evidence obtained was error, because there was no valid inventory search.²⁵⁷

The courts also ruled in the defendants' favor in two other cases. In *Sanders v. State*,²⁵⁸ the court found a confidential informant's tip was insufficient to establish probable cause to search the defendant's car when stopping him for a traffic infraction.²⁵⁹ Subsequently, in *Cash v. State*,²⁶⁰ it was determined that the defendant's actions were insufficient to establish reasonable suspicion he had violated the law, and therefore the officer did not have cause to make an investigatory stop.²⁶¹

In contrast, however, reasonable suspicion for an investigatory stop was found in *Platt v. State*,²⁶² *English v. State*,²⁶³ and *Thurman v. State*.²⁶⁴ Additionally, in *State v. Nixon*,²⁶⁵ evidence obtained from a warrantless search of the defendant's purse, discovered in a warrantless search of the car in which she was riding, was found admissible because the warrantless search of the car was supported by probable cause.²⁶⁶ Furthermore, in *Andrews v. State*,²⁶⁷ the court found that probable cause to believe the defendant committed a crime approximately three months earlier was sufficient to justify a warrantless arrest.²⁶⁸ The court acknowledged, however, that obtaining an arrest warrant would have been the better practice.²⁶⁹

253. 602 N.E.2d 535 (Ind. Ct. App. 1992).

254. *Id.* at 546.

255. *Id.*

256. *Id.* at 545.

257. *Id.* at 546.

258. 576 N.E.2d 1328 (Ind. Ct. App. 1991).

259. *Id.* at 1329.

260. 593 N.E.2d 1267 (Ind. Ct. App. 1992).

261. *Id.* at 1269-70.

262. 589 N.E.2d 222, 226 (Ind. 1992).

263. 603 N.E.2d 161, 162-63 (Ind. Ct. App. 1992).

264. 602 N.E.2d 548, 551 (Ind. Ct. App. 1992).

265. 593 N.E.2d 1210 (Ind. Ct. App. 1992).

266. 593 N.E.2d at 1212-13 (relying primarily on *California v. Acevedo*, 111 S. Ct. 1982 (1991)).

267. 588 N.E.2d 1298 (Ind. Ct. App. 1992).

268. *Id.* at 1303.

269. *Id.*

III. CONCLUSION

It would seem that the amendment of Indiana Rule of Appellate Procedure 4 in 1990, which relieved the Indiana Supreme Court of the mandatory review of criminal cases with sentences of fifty years or less, has given that court the flexibility and time to consider significant criminal law issues brought before it on Petitions to Transfer. There were a large number of such decisions rendered in 1992, and the Indiana Supreme Court seemed more willing to consider significant alterations in criminal procedure and substantive law than it had in the past.

This willingness to more closely scrutinize trial court actions and reconsider relatively long-term principles seems especially apparent in the areas of evidence, sentencing, and general procedural aspects of criminal law. The ability of the court to devote significant analysis to complex criminal law issues, rather than routinely rely on established, but possibly flawed, legal principles is to be applauded. It is incumbent upon those dealing with appeals, however, to make the effort to bring such issues before the court through Petitions to Transfer in appropriate cases. It is interesting indeed, to deal with an area of law where so much is in flux, and practitioners will need to work diligently to stay informed.

Environmental Law: The Roles of Commerce, Citizens, and the Land in an Era of Intensifying Competition

JOHN C. HAMILTON*

Environmental law is, as the developments reported here demonstrate, much more than "environmental regulation." It is a multifaceted reflection of growing competition among several interests. Although struggles among individuals, interest groups, economic combinations, and political parties have been integral to the American political process from before the Constitution's creation, in latter days—and in terms of the environment—that process of intermeshing and sometimes clashing interests now includes, in an increasingly intense form, conflicts among private individuals and organizations, their government, both state and federal, and even conflicts between levels of government itself.

Indiana, in 1992, was unusually active both in terms of expanding the body of environmental law and of testing the relationship of national ideals over development as compared with, and sometimes in competition with, individual liberty and responsibility.

Because Indiana produced so much new law affecting environmental matters, this Article will include three main parts. The first part will discuss the Commerce Clause and out-of-state waste (Part I); the second, citizens' right to sue and the Four County Landfill (Part II); and the third, flood plain regulation and its impact on notions of property (Part III). This Article will also include three shorter "interludes" involving more circumscribed subjects: construction of the solid waste "character" law; 1992 environmental legislation and regulations; and environmental consent decrees and citizen suits under state law.

I. STATE REGULATION OF SOLID WASTE AND THE COMMERCE CLAUSE

The struggle between the states and the national government over commerce has been with us since the Articles of Confederation. One of the essential reasons why the Constitution was created in 1787 was to break down the thirteen protected markets the original states had created during the Revolutionary War. However, it was not until the 1840s, with the rise of the railroads and the movement of immigrants and free blacks, that the Supreme Court approached the Commerce

* Partner, Doran, Blackmond, Ready, Hamilton & Williams, South Bend, Indiana. B.A., 1964, University of Notre Dame; LL.B., 1967, Harvard Law School. The author thanks Professor Robert F. Blomquist, Valparaiso University School of Law, for reviewing and making helpful comments on a draft of this Article.

Clause in terms familiar to present day debates.¹ Under the aegis of the Commerce Clause of the United States Constitution, as well as decisional law developments,² the national economy was so successfully encouraged and fostered that, by the late twentieth century, this country has reached a level of development that is the envy of much of the world. However, as high levels of economic development have been achieved across the country, counter-pressures oriented toward preservation of local resources have led to a running fight between localities and states, on the one hand, and the national economy, on the other, over the issue of garbage, or as it is antiseptically called in modern parlance, "solid waste."³

Because states on the eastern and western seaboard are running out of room to do away with the waste products of their shares of the national economy, the cost of dumping solid waste within their borders has so increased that it has become "economic" to transport it hundreds of miles to states where, relatively speaking, dumping grounds are cheap.⁴ Because of this differential in cost of dumping, several states in which this excess of waste from other states was dumped attempted by a variety of methods either to ban, or restrict, the flow of such waste. Almost all these efforts were defeated, primarily on the basis of the "dormant" effect of the Commerce Clause.⁵

Nevertheless, as Chief Justice Rehnquist, dissenting in *Chemical Waste Management, Inc. v. Hunt*,⁶ noted, these Commerce Clause solid waste cases seem not to have dissuaded states from trying, as best they can, to avoid unlimited imposition of solid and hazardous waste within

1. *Cooley v. Board of Wardens*, 12 How. 299, 318-21 (1852); *Passenger Cases*, 48 U.S. (7 How. 571) (1849); *Thurlow v. Massachusetts*, 46 U.S. (5 How. 504) (1847); 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 134-35, 138-39, 152-55, 168-82, 236-38 (1937).

2. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1960* 65 passim (1992).

3. Solid waste is the subject of extensive federal statutory and regulatory law, including, most prominently, the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901-6987 (1988 & Supp. II 1990) (RCRA) and related regulations, 40 C.F.R. §§ 240-81 (1992). RCRA treats waste differently, depending on whether it is hazardous, see 42 U.S.C. § 6903(5) (1988), or solid waste that does not fit the definition of hazardous waste, see 42 U.S.C. § 6903(27) (1988).

4. The first in a growing series of "garbage as commerce" cases, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), evidences the economic pressures that led to exportation of municipal and hazardous waste.

5. The latest Supreme Court decisions in this area, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992) and *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992), have reaffirmed, in emphatic terms, Commerce Clause protection of the interstate shipment of both municipal and hazardous waste.

6. 112 S. Ct. 2009 (1992).

their borders.⁷ Indiana presents a good example of this effort of some states, by any reasonable means, to stem the flow of out of state waste.⁸

The state's first attempt occurred in 1990. Indiana passed legislation that attempted to slow the receipt of out-of-state hazardous and solid waste by several indirect methods.⁹ Almost immediately a group located in Pennsylvania involved in brokering waste, that is, arranging its consolidation from several public and private generators for shipment elsewhere, filed suit.¹⁰ They obtained injunctive relief against several provisions in the new legislation that imposed differential regulatory effects on out of state waste, on the ground that they conflicted with the Commerce Clause.¹¹ The state did not appeal. Rather, in 1991, the State enacted new legislation that attempted to deal with the problem of uncontrolled dumping of out of state waste by different means.¹²

Although the 1991 legislation, like its predecessor, did not directly restrict the flow of solid waste into the state, it did attempt to regulate both truckers who carried waste to this state and the brokers who arranged its shipment here.¹³ One of the problems the new legislation attempted to deal with was the practice of "back hauling." Trailers that had been used to carry solid waste from Indiana were used on the return trip to ship ordinary goods, including food, back across Indiana's borders. The new legislation attacked the problem both by an outright ban and by a system of informational stickers applied to tractors used to haul solid waste.¹⁴ The legislation also included a differential tipping fee for out-of-state waste, as well as imposition of a system of permits applied to all waste transfer stations, wherever located, and a requirement that out of state brokers of waste post bonds to cover possible liability for violating Indiana's solid waste regulations.¹⁵

7. *Id.* at 2019

8. For examples of other states' recent and unsuccessful efforts, see *In re Southeast Ark. Landfill*, 981 F.2d 372 (8th Cir. 1992); *Chemical Waste Management, Inc. v. Templet*, 967 F.2d 1058 (5th Cir. 1992).

9. 1990 Ind. Acts c. 10, § 15. Those methods included verified statements by truck drivers hauling out of state waste as to where "the largest part of the solid waste was generated." *Id.* As to out of state waste, the driver was required to present a statement from a public official in the state where the waste was generated, that it did not include hazardous or infectious waste.

10. *Government Suppliers Consol. Serv., Inc. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990).

11. *Id.* at 748-49.

12. IND. CODE § 13-7-10.5 (Supp. 1992).

13. See generally Peter M. Racher, *Clean Air Act Amendments Leave Small Business Up In the Air*, 25 IND. L. REV. 1183, 1194-1200 (1992).

14. IND. CODE § 13-7-31 (Supp. 1992).

15. *Id.* §§ 13-7-31-1 to -17 (Supp. 1992).

The same plaintiffs who had defeated the 1990 legislation attacked Indiana's 1991 effort. Although they met with almost complete defeat in district court,¹⁶ they achieved total victory in the United States Court of Appeals for the Seventh Circuit.¹⁷

The state attempted to defend its legislation before the Seventh Circuit on grounds that it promoted health and safety of the citizens of Indiana¹⁸ as well as the reputation of products shipped from this state.¹⁹ The court of appeals found little evidence supporting such a view. The court concluded that health of the citizens of Indiana would not be promoted by the back haul ban because, among other factors, only citizens outside the state would be affected by goods shipped out of state in trailers that had brought solid waste to Indiana, and trailers coming into the state may have carried waste outside the state.²⁰

Although the Seventh Circuit was urged to review the Indiana legislation pursuant to a balancing test,²¹ its analysis of the actual impact of the back haul ban and stickering program persuaded the court that in fact the legislation discriminated directly against such out of state commerce.²² The court therefore scrutinized the legislation, with the burden on the state to justify the discrimination "by a valid factor unrelated to economic protectionism."²³ The court of appeals had little

16. *Government Suppliers Consol. Serv., Inc. v. Bayh*, No. IP 91 899 C (S.D. Ind. Feb. 5, 1992) (Order on Plaintiff's Motion for a Declaratory Judgment).

17. *Government Suppliers Consol. Serv., Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 977 (1993).

18. *Bayh*, 975 F.2d at 1279-80.

19. The state asserted that goods shipped in trailers that had carried waste would be undesirable to the market. *Id.* at 1272-73, 1280.

20. *Id.* at 1279-80.

21. Generally called the "Pike Test," referring to *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970):

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. (citation omitted). If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, (citation omitted), but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.

Id. at 142.

22. *Bayh*, 975 F.2d at 1278-79.

23. *New Energy Co. v. Limbach*, 486 U.S. 269, 274 (1988); *see also* *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2023-24 (1992).

difficulty concluding that all parts of the Indiana legislation attacked by the brokers on appeal failed the test.²⁴ The court went on to conclude that even under the *Pike*²⁵ test, the legislation must fail.²⁶

The decision in *Government Suppliers Consolidated Services, Inc. v. Bayh*,²⁷ is the latest in what is developing to be quite a long series of decisions that have found improper a variety of attempts by states and local units of government to regulate the flow of garbage and hazardous waste into their jurisdictions. It seems difficult from this vantage point to imagine what form of state regulation of such waste might find acceptance by the United States Supreme Court.²⁸ This does not mean, however, that the pressure to resist the flow of waste from one jurisdiction to another has ceased.

Senator Dan Coats of Indiana has, since early 1991, authored legislation allowing individual states to take control of out of state waste disposal within their borders by various means.²⁹ So far none of those efforts have been successful.³⁰ While it seems clear that in the absence of federal legislation, Indiana's ability to affect seriously the flow of solid waste into this state is quite limited.

Decisions stripping from the states any ability to preserve their lands from what they perceive to be excess burdens of waste generated by other sectors of the country³¹ raise potentially quite large questions for the future. Although the debate over the transfer of solid waste from one part of the country to another has generally been dealt with in terms of commerce and the dormant power of the Commerce Clause of the Constitution, underlying this debate is a question of resources and the control of resources. Although the Supreme Court once recognized a state's ability to protect its resources in the context of Com-

24. *Bayh*, 975 F.2d at 1279-81.

25. *See supra* note 21.

26. 975 F.2d at 1285-86.

27. 975 F.2d 1267 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 977 (1993).

28. On the other hand, at least two elements of Indiana's initiative survived, either because they were not attacked at all (a 14-day delay imposed on trailers used to carry food before they might carry waste, IND. CODE § 16-1-28-13.5 (Supp. 1992)), or because the plaintiffs lost the issue in the district court and did not pursue the matter on appeal (inspection of transfer stations located outside as well as inside the state, *id.* § 13-7-10.5-16 (Supp. 1992)). 975 F.2d at 1272 n.5, 1279. Given the failure of the legislation discussed above, it is unlikely these provisions will achieve much of benefit to Indiana citizens.

29. S. 2877 102d Cong., 2d Sess. (1992); S. 2384, 102d Cong., 2d Sess. (1992); S. 153, 102d Cong., 1st Sess. (1991).

30. Although S. 2877 passed the Senate by a vote of 89-2 on July 23, 1992, it failed to pass the House.

31. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2030-31 (Rehnquist, C.J., dissenting).

merce Clause analysis,³² the latest series of decisions over solid waste arguably have rendered absolute, in terms of national value, the process of commerce itself. Thus, if a thing is defined as an item in commerce, in light of the solid waste cases and other Commerce Clause cases on which they are based, a state's ability to preserve its natural resources may be limited to quite small areas of jurisdiction. In the future, it may well be that states will be able to regulate (and possibly control) exploitation of their resources only if they can present a sufficiently precise and well-defined health interest.

As one of the Great Lake states, Indiana is the beneficiary of Lake Michigan. Will the national economy, in future years, require the transshipment of water from well-watered states to drier areas of the country, especially should endemic drought increase in other areas, such as the southwest and Great Plains states?³³ In *Sporhase v. Nebraska*,³⁴ the Supreme Court held that groundwater is an article of commerce and that a state's claim to it as its natural resource does not exempt state regulation of it from the Commerce Clause.³⁵ The Court held that Nebraska's effort to restrict the transfer of groundwater to a state that did not allow its waters to be transferred to Nebraska constituted an impermissible burden on interstate commerce.³⁶ Although it is true that the Supreme Court commiserated with the state's interest in conserving its own water in times of drought,³⁷ it is quite unclear whether the Court would recognize such an interest if a number of states sustained great drought over long periods. On what constitutional basis might Indiana or other water-rich states preserve the waters they have in the face of private or public efforts to transfer water from their boundaries? Senator Coats' effort to persuade Congress to allow the states to control some aspects of interstate commerce is one approach, though difficult to achieve in terms of legislative politics, that can succeed. For example, the Great Lakes states have banded together successfully to protect their greatest water resource. In 1986 Congress was persuaded to pass legislation that appeared to ban diversion of water from the Great Lakes basin.³⁸ How-

32. *E.g.*, *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356-57 (1908).

33. Concerns over global climate change has led commentators to review water policy in terms of shifting drought patterns and consequent demand for large scale transfers of water. *E.g.*, Ludwik A. Teclaff, *The River Basin Concept and Global Climate Change*, 8 PACE ENVTL. L. REV. 355, 377-78 (1991); A. Dan Tarlock, *Western Water Law, Global Warming, and Growth Limitations*, 24 LOY. L.A. L. REV. 979, 999-1001 (1991).

34. 458 U.S. 941 (1982).

35. *Id.* at 951-54.

36. *Id.* at 957-58. *See generally* Richard S. Harnsberger et al., *Interstate Transfers of Water: State Options After Sporhase*, 70 NEB. L. REV. 754, 763-74 (1991).

37. *Sporhase*, 458 U.S. at 955-57.

38. 42 U.S.C. § 1962d-20 (1988). *See generally* Stephen Frerichs & K. William

ever, Congress acted before global warming and possible climate change became matters of general notice. Should the climate change and should great droughts extend over time and space, would the current ban on diversion of water from the Great Lakes survive future Congresses?

Given the decline of states' ability to preserve and conserve resources within their borders as commerce is made supreme, Senator Coats' efforts to persuade some of the other states to combine in Congress against imported waste—the Great Lake States' recent and so far successful union to safeguard their greatest water asset—suggest an era of increasingly intense regional politics over dwindling resources and environmental values.

Interlude No. 1: Indiana's Solid Waste "Character" Requirements, Retroactivity, and Legislative History

In 1990 the Indiana legislature enacted a "character law" intended to govern any application to operate a solid waste disposal facility in this state.³⁹ Indiana Code section 13-7-10.2-3⁴⁰ provides that before an application for a new, renewed, or substantially modified permit may be granted, the applicant "and each person who is a responsible party"⁴¹ must submit to the Indiana Department of Environmental Management (IDEM) a statement disclosing much financial, experiential, and personal information, including criminal histories, if any.⁴²

Easter, *Regulation of Interbasin Transfers and Consumptive Uses from the Great Lakes*, 30 NAT. RESOURCES J. 561, 578-79 (1990). 42 U.S.C. § 1962d-20(d) provides:

No water shall be diverted from any portion of the Great Lakes within the United States, or from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion is approved by the Governor of each of the Great Lakes States.

Id.

39. IND. CODE § 13-7-10.2 (Supp. 1992). As set forth at *id.* §§ 13-7-10.2-1 and 13-7-10-1(e), the good character requirements apply to applications for permits to control solid waste, *see id.* § 13-7-1-22 (Supp. 1992); IND. ADMIN. CODE tit. 329, r. 1-1-1 to 2-21-16 (1992), hazardous waste, *see* IND. CODE § 13-7-8.5 to 8.7 (1988 & Supp. 1992); IND. ADMIN. CODE tit. 329, r. 3-1-1 to 3-59-9 (1992) and atomic radiation, *see* IND. CODE § 13-7-9 (1988).

40. IND. CODE § 13-7-10.2-3 (Supp. 1992).

41. *Id.* The Indiana Code defines responsible party as:

- (1) an officer, a corporation director, or a senior management official of a corporation, partnership, or business association that is an applicant; or
- (2) an individual, a corporation, a partnership, or a business association that owns, directly or indirectly, at least a twenty percent (20%) interest in the applicant.

Id. § 13-7-10.2-2 (Supp. 1992).

42. *Id.* § 13-7-10.2-3(a)(1), (b), and (c).

The new legislation was enacted on March 20, 1990; it was given effect upon passage due to a declaration of an emergency.⁴³ In the meantime, Chemical Waste Management of Indiana, Inc. (Chem Waste), operator of the only extant hazardous waste landfill in Indiana, had on file with IDEM since December 1988, an application under the Resource Conservation and Recovery Act (RCRA) for a Part B permit.⁴⁴ IDEM applied it to Chem Waste's pending Part B permit application. By January 1992, no permit having yet been issued, and IDEM still apparently considering Chem Waste's application in terms of the good character statute. Chem Waste sued IDEM for injunctive and declaratory relief. Chem Waste contended that the statute should not be applied retroactively and that it was unconstitutional in several respects.⁴⁵

After issuing a preliminary injunction against application of the statute to Chem Waste, the trial court granted partial summary judgment on the ground that the statute was not retroactive. The trial court did not decide any of the constitutional issues that Chem Waste had raised.⁴⁶ On appeal IDEM presented two arguments. First, it asserted that the trial court had no jurisdiction because Chem Waste had not exhausted its administrative remedies before filing suit. Second, it argued that the statute did have retroactive effect since it had been enacted as an emergency matter and was made effective on the day of enactment.⁴⁷

The court resolved the exhaustion of administrative remedies issue relying primarily on a well-known Indiana Supreme Court case on the availability of declaratory relief in the context of administrative proceedings.⁴⁸ It concluded that Chem Waste could pursue a declaration of its rights in the matter without first having exhausted its administrative remedies because (1) retroactivity involved a question of law rather than fact; (2) a judicial decision on the issue would not disrupt the administrative process; in fact it would likely simplify IDEM's review of pending permit applications; and (3) Chem Waste's declaratory relief action attacked an agency policy, rather than "an agency action subject to judicial review."⁴⁹

43. 1990 Ind. Acts 1863, 1871.

44. *Indiana Dep't of Env'tl. Management v. Chemical Waste Management*, 604 N.E.2d 1199, 1201 (Ind. Ct. App. 1992).

45. *Id.* at 1201-02.

46. *Id.* at 1202, 1203-04 n.2.

47. *Id.* at 1202, 1205. IDEM also argued, as to retroactivity, that the record contained disputed issues of fact. The court quickly disposed of this argument, by referring to the trial court's analysis of retroactivity and questions of fact: "The trial court expressly decided that the sole undisputed, material fact . . . was that Chemical's application was pending prior to the effective date of the Character Law." *Id.* at 1204.

48. *Wilson v. Board of Ind. Employment Sec. Div.*, 385 N.E.2d 438 (Ind. 1979), *cert. denied*, 444 U.S. 874 (1979).

49. *Chem Waste*, 604 N.E.2d at 1202-03.

The court then turned to retroactivity. Its resolution of that issue appears to have established a form of legislative history as all but invincibly conclusive on whether a statute is to be given retroactive effect.

The court noted the general rule that "a law shall be prospective only in the absence of an express statement that it be retroactive."⁵⁰ It reviewed two features of the legislation that supported prospective application. First, the Good Character Law affects an "applicant" "that applies for . . . a permit."⁵¹ This and similar uses of the term "applicant" persuaded the court that the Good Character Law could only affect one who "applies," which event could only occur after the statute came into existence.⁵²

Second, the court confronted and roundly rejected IDEM's argument that the declaration of emergency implied legislative intent that the law be applied retroactively. Its first point appears unremarkable: "applicants have a right to have their applications considered in accordance with the laws in effect when the application is made."⁵³ The court's second point, on the other hand, appears to be new.

The court described its second ground as "more conclusive" than the proposition it had just stated. On the same day that the Good Character Law was passed another provision in the state's environmental legislative scheme which dealt with financial statements preceding construction or operation of solid waste landfills had also been enacted.⁵⁴ Unlike the Good Character Law, the financial statement provision was accompanied by an uncoded, but specific provision calling for retroactive effect in rather clear terms:

This act applies to:

- (1) a permit application that is filed on or after the effective date of this act,
- (2) a permit application that was filed before the effective date of this act but was not granted or denied . . . before the effective date of this act, and
- (3) a permit application that was filed before the effective date of this act and that was granted . . . before the effective date of this act if the . . . action in granting the permit was appealed

50. *Id.* at 1204.

51. IND. CODE § 13-7-10.2-1 (Supp. 1992).

52. *See Chem Waste*, 604 N.E.2d at 1204-05.

53. *Id.* at 1205. In *Board of Dental Examiners v. Judd*, 554 N.E.2d 829 (Ind. Ct. App. 1990), one of the cases the court cited for this proposition, contained the following: "[W]hile no one has an absolute right to practice dentistry, . . . dentists, like members of other professions and trades, have a cognizable property interest in their ability to practice, and the practice may not be regulated arbitrarily." *Id.* at 832.

54. IND. CODE § 13-7-22-2 (Supp. 1992).

... and that appeal is pending on the effective date of this act.⁵⁵

The court said of this rather clear expression of legislative intent, "[T]his uncodified application clause is precisely the type of expression required to put a statute in reverse."⁵⁶ The Legislature's silence as to retroactivity of the Good Character Law left the court "with no doubt that the General Assembly did not intend for the Character Law to be applied to permit applications pending on the effective date of the act."⁵⁷

Although *Indiana Department of Environmental Management v. Chemical Waste Management of Indiana, Inc.*⁵⁸ certainly is an important clarification of environmental regulatory law, as is true of other "environmental" cases, its holding on legislative history extends to all legislation enmeshed in questions of retroactivity. The very ease in establishing conclusively that the financial statement law would be given retroactive effect will likely simplify future disputes. Ambiguity that had attended statements of emergency, in light of Indiana's relative paucity of formal legislative history,⁵⁹ should no longer exist. If a statute is not attended by a statement of intended application as the financial statement legislation was, it will likely, and automatically, be given prospective effect only. *Chemical Waste Management* has thus given legislators a sure way of establishing retroactivity when they do intend it.

Interlude No. 2: New Legislation

Indiana's output of legislation affecting environmental issues was not as extensive as in 1990 and 1991.⁶⁰ Nevertheless, at least three pieces of legislation are worthy of note.

a. *Indiana Heritage Trust Program*.—In 1992 the Indiana General Assembly added chapter 14-3-20, known as the "Indiana Heritage Trust Program."⁶¹

55. 1990 Ind. Acts ch. 107, § 3.

56. *Chem Waste*, 604 N.E.2d at 1205.

57. *Id.*

58. 604 N.E.2d 1199 (Ind. Ct. App. 1992).

59. See, e.g., *O'Laughlin v. Barton*, 582 N.E.2d 817, 821 (Ind. 1991) (Trial court erred when it considered affidavits of four legislators offered to establish legislative intent).

60. See *Racher*, *supra* note 13.

61. Indiana Code § 14-3-20-1 (Supp. 1992), subsection (1)(b) provides that the trust program: "[w]ill acquire real property for new and existing state parks, state forests, nature preserves, fish and wildlife areas, wetlands, trails, and river corridors. The program will insure that Indiana's rich natural heritage is preserved or enhanced for succeeding generations."

The trust fund will receive regular appropriations by the General Assembly, donations, and fees from "environmental license plates."⁶² The fund itself will be allocated to purchase and maintain property for state park purposes, state forests, nature preserves, fish or wildlife management, and outdoor recreation, historical, or archeological sites. Of note is the fact that the funds cannot be used to pay for costs of removal and remedial action relating to hazardous substances or the cost of waste water treatment.

If properly funded, this legislation could go far to enable Indiana to benefit from the work of private organizations such as the Nature Conservancy, in acquiring and preserving acreage having environmental or recreational values. The legislation could well be successful in terms of its purpose since it establishes a private partnership. The partnership will succeed, however, only to the extent that private individuals provide both small and large donations. Given the apparent public concern over environmental issues in recent years, and provided the trust fund is publicized sufficiently, it may well prove a success. A good sign of the possibility of that success will be the number of "vanity" environmental license plates purchased by the public.

b. Composting.—Another relatively positive legislative development in 1992 was the enactment of a ban on depositing "vegetative matter resulting from landscaping, maintenance, and land clearing projects"⁶³ in a solid waste landfill after September 30, 1994. The new legislation includes provisions governing "composting facilities,"⁶⁴ no doubt on the theory that with the ban against depositing compostable materials in landfills, a private market for composting operations should follow.

One may operate a composting facility "only if the person registers the composting facility with the Department."⁶⁵ The legislation prescribes information to be submitted to the department including, the area it is to serve, an estimate of the volume of materials it will process annually as well as any other information IDEM might require by rule.⁶⁶ A composting facility is prohibited from being located within 200 feet of a drinking water well or a residence in existence when the facility is first registered with IDEM. Furthermore, a privately operated composting facility must be located outside the ten-year flood plain and must be

62. IND. CODE §§ 9-18-29-1 to -5 (Supp. 1992). Each environmental license plate purchased under that legislation will produce an additional fee of \$25.00. *Id.*

63. *Id.* § 13-7-29-3 (Supp. 1992). The legislation also provides that "[a]fter June 30, 1994, a person may not knowingly combine" compostable materials subject to the statute with other types of solid waste. *Id.* § 13-7-35-9 (Supp. 1992).

64. *Id.* §§ 13-7-35-1 to -10 (Supp. 1992).

65. *Id.* § 13-7-35-4.

66. *Id.* § 13-7-35-5.

designed to prevent compost from being placed within five feet of the water table. It must control run-off, manage leachate and maintain controls for dust, odor and noise. The operator of the composting facility must report annually the volume of material it processed during the preceding year.⁶⁷

The Legislature's anticipation that by banning the dumping of compostable materials in a landfill will create a market for composting, reflects what may be the most interesting future thrust of environmental regulation. By excluding certain materials from traditionally easy and cheap disposal, the Legislature has raised the cost of such disposal and may have, thereby, encouraged a new industry servicing a new market. On the other hand, provisions requiring annual reports and potentially close administrative oversight of a business that should not have much adverse environmental impact is a questionable extension of governmental responsibility with two possible adverse results. First, IDEM itself has more than enough work to do in terms of air pollution, hazardous waste, and other major regulatory agendas. Adding oversight of what may turn out to be a number of small composting businesses may interfere with the agency's primary functions. Second, imposing close administrative oversight on what theoretically could be small businesses may add a level of cost that will, at least to some extent, inhibit easy entry into a market place the Legislature has otherwise likely created.

The vegetative material ban should go far to ease volume pressures on Indiana's limited reserves of solid waste landfills. Finally, it may demonstrate how environmental regulation by market preclusion can achieve success in creating new arenas for the free market system to operate.

c. *Voluntary Remediation*.—A third environmental initiative that may have a positive impact on the state is the Legislature's provision for voluntary remediation of sites contaminated by hazardous substances and some forms of petroleum, subject to IDEM's oversight and approval.⁶⁸ In general terms the legislation is intended to allow a site burdened with hazardous substances as defined in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁶⁹ as well as "petroleum" defined as "petroleum asphalt or crude oil"⁷⁰

67. *Id.* § 13-7-35-6.

68. *Id.* §§ 13-7-8.9-1 to -23 (Supp. 1992).

69. 42 U.S.C. § 9601(14) (1988).

70. IND. CODE § 13-7-8.9-3 (Supp. 1992). The addition of some portion of petroleum, not including refined gasoline or other petroleum derived products, responds to the petroleum exclusion in 42 U.S.C. § 9601(14). *See* Wilshire Westwood Assoc. v. Atlantic Richfield Corp., 881 F.2d 801, 804-10 (9th Cir. 1989); Niecko v. Emro Mktg. Co., 769 F. Supp. 973, 981-82 (E.D. Mich. 1991). *Compare* City of New York v. Exxon Corp., 744 F. Supp. 474, 489-90 (S.D. N.Y. 1990).

of certain characteristics, to be remediated by private parties with some protection against future liability.

In terms of effectiveness, the voluntary remediation law has two problems. First, it is true that an applicant who obtains the department's approval is saved from state litigation during the course of the remediation⁷¹ and is issued a certificate of completion from IDEM. It is also true that IDEM can grant the applicant a covenant not to sue which is good against any claimant under state law.⁷² However, the statute specifically provides that the voluntary program of remediation will not save persons affected thereby from liability under federal legislation such as CERCLA or the Resource Conservation and Recovery Act (RCRA).⁷³

The second problem with the program of voluntary remediation is that it involves a rigorous regime of oversight by IDEM that appears little different from what would result from an enforcement action initiated by the agency in the first instance. However, a voluntary remediation might be advisable where the contaminated site is likely not to rise to the level of the national priority list established pursuant to CERCLA and therefore, become the object of an action for response costs or contribution under CERCLA. On the other hand, the sheer cost of complying with the various administrative processes established within the statute may deter smaller businesses from attempting to undertake the effort of voluntarily remediating contaminated property. It remains to be seen to what extent this version of volunteerism will actually be used.

II. CITIZENS AND THE FRAGILE "RIGHT" TO SUE

Beginning with the Clean Air Amendments in 1970,⁷⁴ Congress has inserted a series of "citizen suit" provisions in no fewer than seventeen pieces of environmental legislation. All of them run to a pattern reflective of the notion that federal and state agencies should take the lead when it comes to protecting the environment by way of civil litigation.⁷⁵ First, before a citizen can bring suit, he or she must give written notice to the Environmental Protection Agency Administrator, the state in which the proposed suit is to be brought, and the actual defendant in the

71. IND. CODE § 13-7-8.9-18(e) (Supp. 1992).

72. *Id.* § 13-7-8.9-18 (Supp. 1992).

73. *Id.* § 13-7-8.9-18(d) (Supp. 1992).

74. 42 U.S.C. § 7604 (1983 & Supp. 1992). See *Hallstrom v. Tillamook County*, 493 U.S. 20, 23 n.1 (1989) (collecting statutes).

75. *E.g.*, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987); *United States v. City of Green Forest*, 921 F.2d 1394, 1403 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 914 (1991).

case.⁷⁶ Second, a citizen may not file an action if the federal or state government has taken appropriate steps to remedy the situation giving rise to the claim.⁷⁷

The Clean Water Act and, specifically, its National Pollutant Discharge Elimination System (NPDES) program, has produced most of the reported cases involving citizen suit litigation.⁷⁸ The plaintiff's burden

76. 42 U.S.C. § 6972(b)(1) (Supp. 1992). This section is similar to, but more complicated than other environmental notice provisions. Section 6972(a)(1)(A) authorizes citizens to file suits in federal court against "any person . . . who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter" *Id.* Section 6972(b)(1)(A) requires that such a suit be preceded by 60 days notice given to the Administrator of the EPA, the "State in which the alleged violation occurs" and "the alleged violator of such permit, standard." *Id.*

The complications start at this point. First, the 60-day notice applies to enforce those of RCRA's requirements that apply to the solid waste (not hazardous waste) disposal business. If the alleged violation is of subchapter III of the Act (42 U.S.C. §§ 6921-34 (1983)), which deals with hazardous waste, then, under 42 U.S.C. § 6972(b)(1), a citizen suit "may be brought immediately after such notification." § 6972(b)(1). *See, e.g., Dague v. City of Burlington*, 935 F.2d 1343, 1349-52 (2d Cir. 1991), *rev'd on other grounds*, 112 S. Ct. 2638 (1992). *Compare* 33 U.S.C. § 1365(a) (allowing immediate notice in Clean Water Act cases where toxics are involved).

Second, RCRA allows citizens to sue for injunctive relief against any person: [I]ncluding any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

42 U.S.C. 6972(a)(1)(B) (Supp. 1992). 42 U.S.C. § 6972(b)(2)(A) mandates that one who would bring an imminent endangerment claim under § 6972(a)(1)(B) must give ninety days notice before filing suit.

77. Again, the RCRA citizen suit provision is similar to, but more complicated than, other "due diligence" defenses. 42 U.S.C. § 6972(b)(1)(B) governs § 6972(a)(1)(A) claims alleging violations of permits, standards, and regulations issued under the act. It precludes a citizen suit "if the Administrator [of the EPA] or State has commenced and is diligently prosecuting a civil or criminal action in a court . . . to require compliance with such permit, standard, regulation" 42 U.S.C. § 6972(b)(1)(B).

The due diligence bar to an imminent endangerment claim under 42 U.S.C. § 6972(a)(1)(B) added quite a bit more complexity, affected as it obviously was by CERCLA. 42 U.S.C. § 6972(b)(2)(B) bars a citizen's suit for imminent endangerment if the EPA has, among other things, brought and is diligently pursuing the government's suit for imminent endangerment provided in 42 U.S.C. § 6973 or a suit to recover response costs under 42 U.S.C. § 9606, or is actually engaging in a removal action under 42 U.S.C. § 9604. 42 U.S.C. § 6972(b)(2)(C) makes similar actions by the state bars to suit. *See Merry v. Westinghouse Elec. Corp.*, 697 F. Supp. 180, 182 (M.D. Pa. 1988); H.R. CONF. REP. No. 1133, 98th Cong., 2nd Sess., *reprinted in* 1984 U.S.C.C.A.N. 5649, 5688-89.

78. *See, e.g., National Resources Defense Council, Inc. v. Watkins*, 954 F.2d 974 (4th Cir. 1992); *National Resources Defense Council, Inc. v. Lowengart & Co.*, 776 F. Supp. 996 (M.D. Pa. 1991).

of proof in a NPDES case, relatively speaking, is quite easy since the NPDES permit holder is required by law to make admissions of violations.⁷⁹ In comparison, RCRA's citizen suit provision has, over the years, generated relatively few reported cases.⁸⁰

Indiana has produced more than its fair share of citizen suit litigation over hazardous waste. One hazardous waste landfill, the Four County Landfill in northern Fulton County, has produced no fewer than fifteen published decisions and orders from 1987 through 1992.⁸¹

All, to one degree or another, involve aspects of RCRA's citizen suit statute. The cases reflect a good deal of initial success for the citizens group, Supporters to Oppose Pollution, Inc. (STOP). However, STOP ultimately failed in its efforts to remedy the Four County Landfill. The story of that failure reflects problems with citizen suit legislation

79. See *United States v. Dexter Corp.*, 132 F.R.D. 8 (D. Conn. 1990); Lauren Mileo O'Sullivan, *Citizen Suits Under the Clean Water Act*, 38 RUTGERS L. REV. 813, 820-21 (1986).

80. *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 337-38 (4th Cir. 1983) is an early example of a decision favorable to citizen suits under RCRA. Most of the other reported cases involve the procedural defenses in RCRA already discussed. *E.g.*, *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989); *Garcia v. Cecos Int'l., Inc.*, 761 F.2d 76, 79 (1st Cir. 1985); *McGregor v. Industrial Excess Landfill, Inc.*, 709 F. Supp. 1401, 1406-08 (N.D. Ohio 1987), *aff'd*, 856 F.2d 39 (6th Cir. 1988). In a few cases, citizens did obtain some relief under the statute. *E.g.*, *Dague v. City of Burlington*, 733 F. Supp. 23 (D. Vt. 1990), *aff'd*, 935 F.2d 1343 (2d Cir. 1991), *rev'd on other grounds*, 112 S. Ct. 2638 (1992).

81. *Environmental Waste Control, Inc. v. Agency for Toxic Substances & Disease Registry*, 763 F. Supp. 1576 (N.D. Ga. 1991); *United States v. Environmental Waste Control, Inc.*, 131 B.R. 410 (N.D. Ind. 1991), *aff'd*, 973 F.2d 1320 (7th Cir. 1992); *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 760 F. Supp. 1338 (N.D. Ind. 1991), *aff'd*, 973 F.2d 1320 (7th Cir. 1992); *In re Environmental Waste Control, Inc.*, 125 B.R. 546 (N.D. Ind. 1991); *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 33 E.R.C. 1052 (N.D. Ind. 1991), *aff'd*, 973 F.2d 1320 (7th Cir. 1992); *Supporters to Oppose Pollution, Inc. v. Heritage Group*, 32 E.R.C. 1154 (N.D. Ind. 1990); *United States v. Environmental Waste Control, Inc.*, 737 F. Supp. 1485 (N.D. Ind. 1990); *In re Environmental Waste Control, Inc.*, 31 E.R.C. 1462 (N.D. Ind. 1990); *United States v. Environmental Waste Control, Inc.*, 31 E.R.C. 1458 (N.D. Ind. 1990); *United States (EPA) v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172 (N.D. Ind. 1989); *aff'd*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1621 (1991); *United States (EPA) v. Environmental Waste Control, Inc.*, 698 F. Supp. 1422 (N.D. Ind. 1988); *United States (EPA) v. Environmental Waste Control, Inc.*, 26 E.R.C. 2075 (N.D. Ind. 1987); *In re Environmental Waste Control*, 122 B.R. 341 (Bankr. N.D. Ind. 1990).

For a description of the Four County Litigation through the original judgment (March, 1989), see Robert M. Blomquist, *The Evolution of Indiana Environmental Law: A View Toward the Future*, 24 IND. L. REV. 789, 818-29 (1991). Because of the large number and intertwined nature of the Four County Landfill reported decisions, the names of the cases will be abbreviated hereinafter as follows: *Supporters to Oppose Pollution, Inc. v. Heritage (STOP)*; *United States v. Environmental Waste Control, Inc.* and *In re Environmental Waste Control, Inc. (EWC)*.

in its present state, and it reflects practical difficulties and traps that may befall counsel not wary enough to cope with the kind of litigation RCRA can generate.⁸² What follows is a cautionary tale anyone who considers bringing an environmental citizens suit should review quite closely.

A. *The Four County Landfill*

The Four County Landfill was operated from 1973 until 1978 by the owners of the land, James Wilkins and his father. In 1978, Environmental Waste Control, Inc. (EWC) was formed, and ultimately became solely owned by Stephen Shambaugh. EWC entered into a ten year lease with Wilkins that allowed EWC to operate a landfill on Wilkins' land.⁸³ Beginning in 1980 the landfill began to dispose of only hazardous waste.⁸⁴

By the mid-1980s, groundwater underlying the landfill was observed to be contaminated with relatively low levels of various hazardous substances including benzene, carbon tetrachloride, 1,2 dichloroethane, chloroform, tetrachloroethylene, and trichloroethylene.⁸⁵

B. *A Four County Chronology*

As was true of many hazardous waste landfills in operation at the time, the 1980 amendments to RCRA came into effect, the Four County Landfill automatically received "interim status" when EWC submitted its "Part A" permit application in November 1980.⁸⁶ In the meantime, STOP, an organization made up of residents in the vicinity of the landfill, actively and vocally opposed the Landfill's receipt of waste. In February 1987 the Environmental Protection Agency (EPA), by the Justice Department, filed suit against Shambaugh, Wilkins, and EWC seeking civil penalties and closure of the landfill.⁸⁷ By the time of trial, the government asserted that the landfill lost its interim status because, as of a date in November 1985, it did not have an adequate ground water monitoring system in place and because it did not then have sufficient insurance; it disposed waste in unlined cells; its groundwater

82. The author was lead counsel for STOP from December 1987, forward. *EWC*, 737 F. Supp. 1485, 1489 (N.D. Ind. 1990).

83. *EWC*, 710 F. Supp. 1172, 1181-82 (N.D. Ind. 1989).

84. *Id.* at 1181.

85. *Id.* at 1226-27.

86. *Id.* at 1183. The district court described the Part A permit process in some detail. *Id.* at 1182. See also *Northside Sanitary Landfill, Inc. v. Thomas*, 804 F.2d 371, 373 (7th Cir. 1986); *United States v. Conservation Chem. Co.*, 660 F. Supp. 1236, 1237 (N.D. Ind. 1987).

87. *EWC*, 710 F. Supp. at 1182.

monitoring system did not comply with regulations issued under RCRA; and, finally, a "release" of hazardous waste or constituents had occurred in groundwater beneath the landfill.

The court granted STOP's motion for leave to intervene in November 1987 on the basis of the recently enacted 42 U.S.C. § 9613(i),⁸⁸ and in view of the fact that, in § 9613(i)'s terms, the government did not make any showing that the intervenor's "interest is adequately represented by existing parties."⁸⁹ STOP sought "nothing short of permanent closure."⁹⁰

1. *The EWC Trial*—The trial consumed thirty court days from December 1988 through February 1989. In the middle of the trial, the government's lawyers disclosed to STOP a July 1986 loan agreement among Shambaugh, Wilkins, and an entity known as Resources Unlimited, Inc. (RUI), by which, among other things, RUI agreed to loan EWC money and to serve as its broker of waste shipped to the landfill. RUI was a subsidiary of Heritage Environmental Services, Inc. Both companies were part of an organization called the Heritage Group.⁹¹

The court issued its decision March 1989. In addition to imposing a fine on the defendants of \$2.78 million, for the first, and apparently still the only time in the history of litigation under RCRA, the court closed the Four County Landfill permanently in specific response to STOP's request for that relief.⁹² In addition to the permanent closure order, the court ordered Shambaugh and EWC to take corrective action at the landfill, "forthwith."⁹³

2. *The EWC Bankruptcies and Heritage*—Within ten business days of the trial court's decision, each of the defendants in *EWC* filed for protection under Chapter 11 of the Bankruptcy Code. Following the bankruptcy filing, in addition to reporting approximately \$2 million in cash on hand,⁹⁴ EWC disclosed contract documents by which, from December 1986, RUI controlled a bank account into which all of EWC's receipts were deposited.⁹⁵ The documents also reflected the fact that in August 1988, RUI had agreed to pay Shambaugh and Wilkins \$250,000 each for an option to purchase the landfill within the next three years for a prize between \$5 million and \$10 million.⁹⁵ RUI eventually

88. *EWC*, 698 F. Supp. 1422, 1425 (N.D. Ind. 1988).

89. *Id.* at 1440-41.

90. *EWC*, 710 F. Supp. at 1181.

91. *Id.* at 1203-04 & n.28.

92. *EWC*, 917 F.2d at 331-32 & n.2; *EWC*, 710 F. Supp. at 1245-47.

93. *EWC*, 710 F. Supp. at 1249-55.

94. *EWC*, 125 B.R. 546, 547 (Bankr. N.D. Ind. 1991).

95. Appendix for Appellants at 35, 65-66, Supporters to Oppose Pollution, Inc. v. Heritage, No. 91-1247 (7th Cir. 1991) (hereinafter STOP Appendix).

96. *Id.* at 37-38, 72-87.

filed a secured claim against EWC's estate in the amount of \$430,000.⁹⁷

3. *STOP's First Complaint Against Heritage*.—In July 1989 STOP gave "immediate" notice of its intent to sue as provided by 42 U.S.C. §§ 6972(b)(1) and 2(A), and filed the first of what would become three separate actions against the Heritage Group and others, including RUI and Heritage Environmental Services, Inc.

In October 1989 the Heritage Group moved to dismiss STOP's complaint on several grounds. One ground asserted that STOP had not given ninety days notice of its claim of imminent endangerment, contrary to 42 U.S.C. § 6972(b)(2)(A). Another, based on *res judicata*, contended that STOP's failure to name the Heritage Group as an additional party defendant in *EWC* barred it from doing so in a second action. A third contended that STOP's claim based on the hazardous waste provisions in RCRA was barred in terms of 42 U.S.C. § 6972(b)(1)(B) because the government was diligently pursuing *EWC*, then on appeal.

4. *Hallstrom and STOP's Second Complaint*.—In the meantime, on November 7, 1989, the Supreme Court issued its decision in *Hallstrom v. Tillamook County*⁹⁸ that the sixty-day notice requirement in 42 U.S.C. § 6972(b)(1) was a mandatory condition precedent to suit and that failure to give the notice before suit was filed required dismissal of the action, no matter how far along it may have proceeded.⁹⁹

Later, in November 1989, in an effort to comply with the Supreme Court's holding in *Hallstrom*, STOP dismissed its first complaint against Heritage and immediately filed a new suit by way of a slightly revised complaint.

STOP's second complaint against Heritage was, like the first, in two counts. Count I sought relief for the Landfill's imminent endangerment.¹⁰⁰ Count I was new in terms of the claims asserted in *EWC*. Neither the government nor STOP had asserted a claim for imminent endangerment

97. *In re EWC*, No. 89-30581 (Bankr. N.D. Ind. 1989).

98. 493 U.S. 20 (1989).

99. The Supreme Court left open the option of plaintiffs giving notice and filing suit in compliance with the statute. *Id.* at 32.

The Supreme Court was not presented with the immediate notice required in suits involving hazardous waste. The district court in *EWC* did face that issue; it concluded that the immediate notice should not be treated as jurisdictional. 710 F. Supp. 1172, 1190. The Seventh Circuit affirmed this and several other procedural rulings in a footnote. *EWC*, 917 F.2d 327, 331 & n.1; *see also* Dague v. City of Burlington, 935 F.2d 1343, 1349-52 (2d Cir. 1991). (Court would not dismiss untimely RCRA notice as to some claims where others were subject of immediate notice pursuant to 42 U.S.C. § 6972(b)(1)&(2)).

100. STOP Appendix at 24, 27-125. STOP incorrectly cited 42 U.S.C. § 6973(a) as the basis for its suit. Section 6973(a) authorizes the government to bring imminent endangerment cases in terms essentially identical to 42 U.S.C. § 6972(a)(1)(B)'s authorization of citizens to do so.

in *EWC*. Count II, on the other hand, was presented as derivative of the claims both the government and STOP had raised in *EWC*. It sought to hold Heritage liable for the remedies awarded in *EWC* and for current and future violations of RCRA's hazardous waste provisions at the landfill.¹⁰¹

5. *Second Complaint Against Heritage Dismissed.*—The district court dismissed STOP's complaint against Heritage in July 1990.¹⁰² The court addressed only two of the group's positions, which it held were conclusive. The court treated Count II, the claim based on alleged violations of RCRA's hazardous waste provisions, first. While the court discussed Heritage's contention that the government's involvement in the appeal in *EWC* and the pending *EWC* bankruptcies constituted "diligent prosecution of an action in court" for purposes of 42 U.S.C. § 6972(b)(1)(A), its actual holding sounded as though it was based on principles of res judicata.¹⁰³

Having dismissed count II, the court then dismissed count I, imminent endangerment, because STOP had not complied with the ninety-day notice requirement in 42 U.S.C. § 6972(b)(2)(A).¹⁰⁴ The court acknowledged that STOP had given presuit notices in July of the previous year, just before it filed its first suit against Heritage. However, relying on dictum in *Hallstrom v. Tillamook County*,¹⁰⁵ the court concluded that notice may be given only when no litigation exists among the affected parties.¹⁰⁶ In August 1990, STOP gave a new round of RCRA presuit notices¹⁰⁷ as a prelude to a third suit against Heritage.¹⁰⁸

101. STOP Appendix for Appellant at 47-48. Unlike the claim of imminent endangerment, which specifically covers past actions, 42 U.S.C. §§ 6972(a)(1)(B), 6973(a), Count II's claims, based as they were on 42 U.S.C. § 6972(a)(1)(A), could lie only if it included current or future violations of the hazardous waste provisions. See *Gawaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 58-59 (1987); *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1187 (E.D. Cal. 1989).

102. *STOP*, 32 E.R.C. 1154 (N.D. Ind. 1990).

103. Given the breadth of the order in the original EPA action, STOP's allegations that the Heritage Group committed substantially the same violations as those of the original defendants bars STOP from commencing a new action for the same violations as in the EPA action. The EPA (and STOP) continue to pursue the EPA action. Therefore, this citizen suit is barred by 42 U.S.C. § 6972(b)(1)(B). *Id.* at 1156.

104. *Id.*; see *infra* note 181 and related text for the operative language of RCRA § 6972(b)(2)(A).

105. 493 U.S. 20 (1989) ("Retroactive operation of our decision will further the congressional purpose of giving agencies and alleged violators a 60-day nonadversarial period to achieve compliance with RCRA regulations."). *Id.* at 32.

106. *STOP*, 32 E.R.C. at 1156. In *Coalition Against Columbus Center v. New York City*, 750 F. Supp. 93, 95 (S.D.N.Y. 1990), the court noted that a Clean Air Act claim had not been preceded by timely notice. However, since the proper period had run since a post-complaint notice had been given, the court stated it would dismiss the claim

6. *1989 Judgment in EWC Affirmed.*—In October 1990, the Seventh Circuit affirmed all aspects of the district court's judgment in *EWC*, including a number of jurisdictional and procedural rulings important to environmental citizens suits, not the least of which was the court's order permanently closing the landfill.¹⁰⁹ At the end of its opinion, the Seventh Circuit approved, in passing, several other rulings. In one of them, the district court concluded that a winning citizen who had intervened pursuant to 42 U.S.C. § 9613(i) could obtain attorneys fees and expenses, even though § 9613(i) did not so provide.¹¹⁰

7. *Third Complaint Against Heritage.*—By November, 1990, more than ninety days had passed since STOP had given its new round of presuit notices to Heritage. That month, STOP filed its third complaint against Heritage.¹¹¹ Unlike the earlier complaints, it was limited to a claim of imminent endangerment.

8. *STOP's Third Complaint Dismissed.*—The district court dismissed STOP's third complaint in March 1991.¹¹² The district court presented two grounds for dismissing the last of STOP's complaints against Heritage. The first, once again, involved the notice provision in

without prejudice and allow plaintiffs to refile immediately, presumably on the basis of the original notice.

This result probably violates the decision in *Hallstrom v. Tillamook County*: "Petitioners remain free to give notice and file their suit in compliance with the statute to enforce pertinent environmental standards." 493 U.S. at 32 (emphasis added). It appears that, where a claim is dismissed because of a bad pre-suit notice, the Supreme Court would require a new and timely notice be given before the new action may be filed. That, at least, is what the district court held as to STOP's second complaint against Heritage. *STOP*, 32 E.R.C. at 1156.

107. *STOP* Appendix at 244-53.

108. *STOP*, 760 F. Supp. 1338, 1339 (N.D. Ind. 1991).

109. In addition to holding that RCRA authorized permanent closure of an interim status facility by judicial decree, the Seventh Circuit held that the court properly balanced the equities, "notwithstanding that it may not have even been required to undertake such a balance. It is an accepted equitable principle that a court does not have to balance the equities in a case where the defendant's conduct has been willful." *EWC*, 917 F.2d at 332. Compare, *N.R.D.C. v. Texaco Refining*, 906 F.2d 934, 939-41 (3d Cir. 1990) (Court balances equities in environmental case.).

The court made clear that a citizen group had the same power as the government to obtain permanent judicial closure of a RCRA facility: "Our conclusion is in no way changed by the fact that it was STOP, and not the EPA, that asked for permanent closure of the Landfill." *EWC*, 917 F.2d at 332 & n.2.

110. *Id.* at 335. The district court had concluded that, "for attorney fee purposes, an intervention under 42 U.S.C. § 9613(i) may be deemed a suit brought pursuant to the citizens suit section." [42 U.S.C. § 6972] *EWC*, 710 F. Supp. 1172, 1248 (N.D. Ind. 1989).

111. *STOP* Appendix at 202-54.

112. *STOP*, 760 F. Supp. 1338 (N.D. Ind. 1991).

42 U.S.C. § 6972(b)(1)(B). While STOP had given more than ninety days notice before filing its complaint, once again, STOP had not done so during a “nonadversarial” period. Whereas the earlier dismissal was based upon the pendency of the original complaint against Heritage, it was the pendency of the court’s nonfinal dismissal of the second complaint against Heritage that destroyed the possibility of a “nonadversarial” period following the August 1991 notice.¹¹³

Unlike the July 1990 dismissal of STOP’s second complaint—when the court refused to consider Heritage’s reliance on *res judicata* as a defense—this time the court held that, because STOP had failed to name Heritage as defendants in the original EPA suit, it was barred from suing them thereafter on the basis of *res judicata*. Relying on a long line of Seventh Circuit authority, the court concluded that STOP’s claim of imminent endangerment, although different in some respects from the claims STOP and the government asserted in *EWC*, was not such as to avoid the Seventh Circuit’s cases defining “the same cause of action”¹¹⁴ and, in fact, constituted nothing more than a change in legal theory.¹¹⁵

C. The Seventh Circuit’s Decision

1. *The Seventh Circuit’s Rulings on Res Judicata.*—The Seventh Circuit affirmed the district court’s dismissal of STOP’s third complaint grounded on *res judicata*.¹¹⁶ First, it held that *Federated Department Stores, Inc. v. Moitie*¹¹⁷ “scotches equitable arguments” for exceptions to merger and bar.¹¹⁸ The court then rejected STOP’s arguments that its claim of imminent endangerment was different in kind—was a different cause of action—from claims of hazardous waste violations that both STOP and the government had alleged in *EWC*. In so doing, the court

113. *Id.* at 1342. The dismissal was “nonfinal” because STOP had filed a motion to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, which was not ruled on until January 1991.

114. See, e.g., *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986).

115. *STOP*, 760 F. Supp. at 1345. Since *res judicata* was available to Heritage, in part due to its “privity” with the *EWC* defendants, in a last ditch effort to impose liability on Heritage, STOP attempted to enforce the March 1989 judgment in *EWC* directly against Heritage. STOP hoped to persuade a court, whether district or appellate, that the very privity that triggered *res judicata* should allow STOP to execute the source of that *res judicata* effect, the judgment in *EWC*, directly against Heritage. The district court rejected the position, *EWC*, 131 B.R. 410, 422-23, and the Seventh Circuit affirmed in emphatic terms. *STOP*, 973 F.2d 1320, 1327-28.

116. *STOP*, 973 F.2d 1320, 1325 (7th Cir. 1992).

117. 452 U.S. 394 (1981).

118. *STOP*, 973 F.2d at 1325.

relied essentially on the definition of "cause of action" in *Car Carriers, Inc. v. Ford Motor Co.*¹¹⁹

Having rejected all of STOP's opening arguments, the court turned to STOP's effort to make use, in its reply brief, of the rule of non-preclusion as to a successful plaintiff who later sues parties in privity with the judgment debtor in Restatement (Second) of Judgments, Section 49. The Court apparently misunderstood STOP's argument: "In its reply brief [STOP] tries to retract the concession in its opening brief that Heritage is the privy of EWC. This comes too late and is more than a little odd, for the assertion that Heritage controlled EWC's actions is the foundation of [STOP's] substantive contentions."¹²⁰ The court then completed the res judicata portion of its opinion by referring to an important Supreme Court decision on collateral estoppel: "[T]he sequence here tracks *Montana v. United States*¹²¹ (citation omitted): suit No. 1 by or against the cat's paw, followed by suit No. 2 by or against the cat. Under *Montana*, cat and cat's paw are the same, and the second suit must be dismissed."¹²²

2. *Implications.*—On its face, the opinion holds that any plaintiff must name all defendants in privity with each other, before judgment, or face an insuperable defense of preclusion based on that judgment. Whether the plaintiff won a judgment or lost the suit does not matter. The holding that a plaintiff who won an unsatisfied judgment against parties in privity with nonparties is precluded from suing the nonparties in a second suit is new law in this circuit and everywhere else.

Montana v. United States,¹²³ first, did not involve claim preclusion at all. Second, its facts, and its holding, were limited to a plaintiff—and the party who controlled the plaintiff—who *lost* the first action. *Montana*, therefore, serves as no authority for the result the Seventh Circuit reached in *STOP v. Heritage*.¹²⁴

STOP v. Heritage's holding that a winning plaintiff is precluded by merger from suing another obligor in a later suit thus appears unique—but for the result in *Lowell Staats Mining Co. v. Philadelphia Electric Co.*¹²⁵ *Staats Mining* did involve preclusion of a plaintiff who had won a judgment in the first action from suing, in a second action, a partner of a defendant in the first. However, the Tenth Circuit was careful to note that the first judgment merged the later claim because controlling

119. 789 F.2d 589 (7th Cir. 1986).

120. *Id.* at 1327.

121. 440 U.S. 147 (1979).

122. *STOP*, 973 F.2d at 1327.

123. 440 U.S. 147 (1979).

124. 973 F.2d 1320 (7th Cir. 1992).

125. 878 F.2d 1271 (10th Cir. 1989).

state substantive law rendered partners jointly and severally liable for partnership obligations. The Tenth Circuit did not reject the general rule of nonpreclusion as to successful plaintiffs bringing second actions.¹²⁶

The Seventh Circuit's holding is, in fact, unique. The holding could have a profound effect on all litigation involving multiple defendants. Plaintiffs must invest inordinate resources into finding all possible defendants before filing suit (or at least before judgment). For impecunious plaintiffs, such as citizen groups like STOP, the extra burden may be unbearable. Thus, in addition to the several statutory barriers citizen environmental litigants must face, they now face an all but insuperable practical one. For, under *STOP v. Heritage*, "silent partners" actually responsible for environmental damage will benefit from creating fronts and shadow corporations.

The government played no role in STOP's efforts to impose liability beyond the original *EWC* defendants. Nevertheless, the government should be concerned about the Seventh Circuit's holding on preclusion. The government was the other winning plaintiff in *EWC*. There is nothing about the holding that would not apply in equal measure to a suit the government might bring against defendants such as *Heritage* after a successful, but unsatisfied, first action.¹²⁷

*Interlude No. 3: State ex rel Prosser v. Indiana Waste Systems*¹²⁸—
Indiana Consent Decrees and Indiana Citizen Suits

For years the Gary city dump had been a thorn in the side of Indiana's environmental agency. As early as 1977 the state had sought an injunction against the dump due to various violations of environmental requirements.¹²⁹ Over the next eleven years, the case encompassed another appeal, a permanent injunction (almost immediately vacated), lengthy periods of inactivity, a contempt citation which also was stayed, and, finally, an "Agreed Judgment" between the Indiana Department of Environmental Management (IDEM) and the city in December 1988.¹³⁰

126. *Lowell Staats Min. Co., Inc. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1279 (10th Cir. 1989).

127. The Seventh Circuit described the district court's decision in terms that put the government in the same shoes as STOP: "[B]ecause by [STOP's] own argument *Heritage* is at least a privy of *EWC* (if it is not *EWC*'s alter ego), the final judgment concerning *EWC* in the case the EPA and [STOP] jointly prosecuted forecloses any later litigation against *Heritage* under RCRA." 973 F.2d at 1325.

128. 603 N.E.2d 181 (Ind. Ct. App. 1992).

129. The early history of the Gary dump litigation is described in *City of Gary v. Stream Pollution Control Bd.*, 422 N.E.2d 312, 313-15 (Ind. Ct. App. 1981).

130. *State ex rel. Prosser v. Indiana Waste Sys., Inc.*, 603 N.E.2d 181, 183 (Ind. Ct. App. 1992); see also *State ex rel. Prosser v. Lake Circuit Court*, 565 N.E.2d 751, 752-53 (Ind. 1991).

Under the agreed judgment, the dump could operate until January 1, 1990 with closure to be completed by June 30, 1991. On January 2, 1990, the city requested the court to stay the Agreed Judgment. By May 30, 1990, the city (under pressure of yet another order compelling compliance with the December 1988 agreement) and Indiana Waste Systems, Inc. (IWS), an operator of solid waste landfills, were negotiating a basis for IWS to manage the dump, subject to state approval.¹³¹ That deal fell through and, on May 31, the city told the court it did not have an agreement with IWS. The City again requested an extension to seek another third-party operator. The court continued the case until June 4, 1990.¹³²

On June 4, the city stated that it had reached an agreement with a competitor of IWS.¹³³ The next day, both the city and the State submitted to the court an agreed judgment, to which was attached an agreement between Mid-American and the city.¹³⁴ The court stayed earlier enforcement orders and set a hearing for July 2. On June 29, IWS filed a motion to intervene together with a complaint.¹³⁵ The court reset the July 2 hearing on the agreed judgment to July 27. On that date, however, the court granted IWS' motion for leave to intervene and delayed the hearing on the agreed judgment. On December 21, 1990, the court rejected the agreed judgment and replaced it with a set of alternative proposed "resolutions of the case."¹³⁶ After the state and city rejected the court's alternatives,¹³⁷ the court entered a judgment that rejected the agreed judgment of June 1990, and reaffirmed a series of earlier orders.¹³⁸ All parties appealed.

131. IWS owned land adjacent to the city's dump which it intended to operate as a landfill once it received a permit to do so. It was also suing the city over pollution of its property allegedly emanating from the city's dump. 603 N.E.2d at 183 n.3; 565 N.E.2d at 752-53.

132. *Prosser*, 603 N.E.2d at 183-84.

133. The agreement was allegedly made with Mid-American Waste Systems of Indiana (Mid-American). *Id.* at 184.

134. *Id.* According to the agreement, "Mid-American was to operate the Dump, and perform remedial activities, and to be responsible for closure and post-closure activities at the Dump." *Id.*

135. IWS' complaint was based on Indiana Code § 13-6-1-1(a). This section provides in relevant part: "a corporation . . . maintaining an office in Indiana may bring an action for declaratory and equitable relief in the name of the state against . . . a state agency, or . . . a city, . . . or an official, . . . for the protection of the environment of Indiana from significant pollution, impairment, or destruction." IND. CODE. § 13-6-1-1(a) (Supp. 1992).

136. *Prosser*, 603 N.E.2d at 184-85 n.4.

137. IWS accepted both.

138. *Prosser*, 603 N.E.2d at 184.

Although several issues were presented on the appeal, only two merit attention here. They involve the status of Indiana environmental consent decrees and how one portion of Indiana's citizen suit statute operates.

1. *Environmental Consent Decrees in Indiana*.—Indiana has long had a clear rule on the extent to which a court may reject an agreed judgment proposed by the parties. In *State v. Huebner*¹³⁹ the Indiana Supreme Court held that, when presented with an agreed resolution of the case, the court does not perform a judicial act. The duty of the court is ministerial—to have the writing entered as agreed upon.¹⁴⁰ Given this established rule, the appellate court had little difficulty rejecting IWS' argument that the court had "discretion to evaluate the substance of the agreement, and, when the trial court finds the agreement unreasonable . . . the court may refuse to approve"¹⁴¹ it.

Although adherence to the rule of nondiscretion was no doubt correct for an intermediate court of appeal, the supreme court might revisit this area of the law when confronted with a proposed agreed equitable decree that would operate over some substantial period of time and require ongoing judicial oversight.¹⁴² As IWS argued, federal cases grant trial courts some discretion to reject proposed consent decrees.¹⁴³ On the other hand, where a specialized agency presents a comprehensive agreement reflective of the agency's expertise, it can be argued that the need for judicial oversight is negligible.¹⁴⁴

2. *Indiana Citizen Suits and Diligent Prosecution*.—Although the court considered IWS' arguments against the June 5 agreed judgment, it also concluded that the trial court had no basis for granting it leave to intervene. Noting that it was presented with a case of first impression, the court concluded that the diligent prosecution bar in Indiana Code section 13-6-1-1(b)(2)¹⁴⁵ left IWS with no interest on which to intervene,

139. 104 N.E.2d 385 (Ind. 1952).

140. *Id.* at 388. See *Ingoglia v. Fogelson Cos.*, 530 N.E.2d 1190, 1199 (Ind. Ct. App. 1988); *Ash v. Chandler*, 530 N.E.2d 303, 306 (Ind. Ct. App. 1988); compare *Hanover Logansport, Inc. v. Robert C. Anderson, Inc.*, 512 N.E.2d 465, 470-71 (Ind. Ct. App. 1987).

141. *Prosser*, 603 N.E.2d at 185-86.

142. *Ingoglia*, 530 N.E.2d at 1199-1200.

143. *E.g.*, *Donovan v. Robbins*, 752 F.2d 1170, 1177 (7th Cir. 1984). The court's extent of discretion is circumscribed. See *Durrett v. Housing Auth. of Providence*, 896 F.2d 600, 603 (1st Cir. 1990), *United States v. City of Alexandria*, 614 F.2d 1358, 1360-62 (5th Cir. 1980); *United States v. City of Miami*, 614 F.2d 1322, 1332-33 (5th Cir. 1980).

144. *Alexandria*, 614 F.2d at 1333.

145. This section provides that a citizen or corporation that brings suit under this section "may not maintain the action" unless "the agency that commences an administrative proceeding or a civil action on the alleged pollution, impairment, or destruction does not diligently pursue the administrative proceeding or civil action." IND. CODE § 13-6-1-1(b)(2) (Supp. 1992).

since it failed to show that the state had not diligently prosecuted its case against Gary through the June 5 agreed judgment.¹⁴⁶ Because no Indiana authority was available, the court construed Indiana Code section 13-6-1-1(b)(2)'s diligent prosecution clause in terms of RCRA's diligent prosecution defense¹⁴⁷ and two federal cases.¹⁴⁸ The court refused IWS's invitation to define diligence in a way that "would require courts" to consider the nature and substance of the agency's actions," and to "second guess the agency's motives in determining whether the agency was diligent in its pursuit of the case."¹⁴⁹ Instead, after discussing the federal cases the court synopsized their approaches to "diligence:"

[T]he courts did not consider the substance of the government action, nor did the court in either case speculate or attempt to evaluate possible motives. Rather, the issue of whether the government was diligently prosecuting its case focused on the degree to which the government remained involved in the case after commencing the action.¹⁵⁰

The court concluded that IWS had no standing because the State had maintained an active involvement in the case against the city, including its effort to resolve it by way of the agreed judgment.¹⁵¹ The court's distillation of federal authority appears to be a workable standard.

The decision does not resolve problems with Indiana Code section 13-6-1-1 itself. Several inherent problems with this legislation raise doubts about how many claims will be pursued under it. First, it is somewhat unclear what sort of claims the statute actually covers. A federal court concluded a few years ago that the statute did not control "environmental" claims that fell within the framework of traditional causes of action.¹⁵² The statute will likely be applied to claims which the Attorney General might bring, presumably including attempts to enforce state environmental statutes or regulations or in some other way to defend the interests of the State or substantial segments of its population.

The very size and complexity of such "AG-like" cases is likely to limit the scope of section 13-6-1-1, at least from the point of view of

146. *State ex rel. Prosser v. Indiana Waste Sys., Inc.*, 603 N.E.2d 181, 187-89 (Ind. Ct. App. 1991).

147. 42 U.S.C. § 6972(b)(1)(B) (1988).

148. *Prosser*, 603 N.E.2d at 187-89. See *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991) and *McGregor v. Industrial Excess Landfill, Inc.*, 709 F. Supp. 1401 (N.D. Ohio 1987), *aff'd*, 856 F.2d 39 (6th Cir. 1988).

149. *Prosser*, 603 N.E.2d at 188.

150. *Id.* at 189.

151. *Id.*

152. *Massa v. Peabody Coal Co.*, 698 F. Supp. 1446, 1452 (S.D. Ind. 1988).

ordinary citizens. Unlike federal citizen suit statutes, section 13-6-1-1 has no provision for an award of attorneys fees or expenses to successful claimants.¹⁵³ It is far more likely, therefore, that Indiana Code section 13-6-1-1, with its pre-conditions to suit, will be chosen as a shield rather than as a sword, as it was in *State ex rel. Prosser v. Indiana Waste Systems, Inc.*.

D. The Seventh Circuit's Decision in STOP v. Heritage Group

1. *The Seventh Circuit's Ruling on Diligent Prosecution.*—As we return to the Seventh Circuit's decision in *STOP v. Heritage Group*, and specifically its holding on diligent prosecution, it may be well to review what has and has not occurred at the Four County Landfill. First, despite the fact that the district court in *EWS* ordered corrective action "forthwith" in March 1989, in fact no remediation at the landfill has occurred. By March 1991, the district court noted that data disclosed after the trial in *EWC* showed contamination in the groundwater at the landfill to have reached "spectacularly high levels."¹⁵⁴ Second, the district court's corrective action order by which the landfill was to be cleaned up on a rush basis was issued under RCRA, not CERCLA.¹⁵⁵ The CERCLA remedy remains unused—more than four years after the order was issued.

Nevertheless, because the government won *a* judgment, according to the Seventh Circuit, it has diligently prosecuted "an action" that bars any citizen from attempting to achieve what that original action was intended to achieve. This despite the fact that, once the government obtained its unenforceable judgment against the bankrupt *EWC* defendants, it took no action against third parties the citizens attempted to sue. The court's view of diligent prosecution bars *STOP* (and possibly others) from even attempting to achieve remediation.

The court's construction of 42 U.S.C. § 6972(b)(1)(B) is not compelled by its language. The relevant language is: "If the Administrator . . . is

153. Compare 42 U.S.C. § 6972(e) (1988) and 33 U.S.C. § 1365(d) (1988).

154. *EWC*, 125 B.R. 546, 548, 551 (Bankr. N.D. Ind. 1991).

155. *EWC*, 710 F. Supp. 1172, 1241-42; 1248-55 (N.D. Ind. 1989). On March 29, 1989, the district court ordered corrective action on the basis of these findings, The EPA has demonstrated its entitlement to an order that *EWC* implement a corrective action plan in light of the release of hazardous waste constituents into the groundwater beneath the Landfill. . . . Time is of the essence in remedying such contamination; to await the passage of the contamination from the facility's boundaries simply compounds the difficulties. As the EPA noted during final argument, one need not await a catastrophe before ordering corrective action.

Id. at 1241.

diligently prosecuting a civil or criminal action . . . to require compliance.”¹⁵⁶ This does not support an interpretation that, in effect, has amended § 6972(b)(1)(B) to provide a citizen suit is barred, if the Administrator is diligently prosecuting a civil or criminal action *or as a result of an action has obtained a judgment against any party*. The plain wording of § 6972(b)(1)(B) seems to mean precisely the contrary. Even though the government *had* obtained a judgment in *EWC* against some parties responsible for violations of RCRA and its regulations, when STOP brought its suits against Heritage, the government was not diligently prosecuting an action that had any bearing on the problem that gave rise to the *EWC* case.

Several Clean Water Act cases¹⁵⁷ have made it clear that earlier litigation by the government does not preclude later citizen recourse to the courts, where the government's action has ceased,¹⁵⁸ or is irrelevant to the problems the citizens wish to address.¹⁵⁹ These cases are consistent with available legislative history. The Clean Water Act's diligent prosecution clause first appeared as section 505 of the Federal Water Pollution Control Act Amendments of 1972.¹⁶⁰ In a senate report,¹⁶¹ the Public Works Committee said of the notice/diligent prosecution language in section 505:

The Committee has provided a period of time after notice before a citizen may file an action against an alleged violator. The time between this and filing of the action should give the administrative enforcement office an opportunity to act on the alleged violation.

It should be emphasized that if the agency had not initiated abatement proceedings following notice or if the citizen believed efforts initiated by the agency to be *inadequate*, the citizen might

156. 42 U.S.C. § 6972(b)(1)(B).

157. 33 U.S.C. § 1365(b)(1)(B) provides that no citizen suit “may be commenced if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action . . . to require compliance.” *Id.*

158. *New York Coastal Fishermen's Ass'n. v. Department of Sanitation*, 772 F. Supp. 162, 165-69 (S.D.N.Y. 1991); *Connecticut Fund for Env't v. L & W Indus.*, 631 F. Supp. 1289, 1291 (D. Conn. 1986); *S.P.I.R.G. v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1427-28 (D. N.J. 1985). See *United States v. City of Green Forest*, 921 F.2d 1394, 1405 (8th Cir. 1990).

159. *Hudson River Fishermen's Ass'n. v. Westchester County*, 686 F. Supp. 1044, 1052-53 (S.D.N.Y. 1988) (Citizen's suits are not barred “when it appears that the Government's effort does not address the factual grievances asserted by private attorneys general.”). *Id.*

160. *Codified* at 33 U.S.C.A. § 1365 (West 1986 & Supp. 1993).

161. S. REP. NO. 414, 92nd Cong., 1st Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3745-46.

choose to file the action. In such case, the court would be expected to consider the petition against the background of the agency action and could determine that such action would be adequate to justify suspension, dismissal, or consolidation of the citizen petition. On the other hand, if the court viewed the agency's action as *inadequate*, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action.¹⁶²

In *Dague v. City of Burlington*,¹⁶³ a case brought under RCRA over a leaking landfill, the State of Vermont had earlier entered into an "Assurance of Discontinuance" in the form of a state court order "requiring compliance with the standards alleged to have been violated."¹⁶⁴ On this basis the defendant argued that the citizen plaintiffs were barred from suit due to the state's diligent prosecution. The Second Circuit held that a citizen could sue the defendant free of the bar in § 6972(b)(1)(B) because, first, the consent decree was not the product of a suit, and therefore was not "an action." Second, the court then assumed the consent decree was "an action" and still upheld the citizens' right to sue. Although the state did some things to enforce the Assurance, its "conduct does not meet the level of diligence that would trigger the prohibition of a citizen suit."¹⁶⁵ The state's later act of filing suit did not constitute diligent prosecution¹⁶⁶ in light of the actual effect of the state's actions and inaction.

2. *Implications.*—If followed by other courts, the Seventh Circuit's clear preference for SuperFund legislation, the "heavy artillery"¹⁶⁷ of cleanup laws, will go far to prevent those without wealth from enforcing any part of RCRA and to moot § 6972. First, while CERCLA does contain a citizen suit provision,¹⁶⁸ its scope is distinctly limited.¹⁶⁹ In

162. Cf., S. CONF. REP. NO. 92-1236, 92nd Cong., 2d Sess. (1972), *reprinted in*, 1972 U.S.C.C.A.N. 3776, 3822-23 (emphasis added).

163. 935 F.2d 1343 (2d Cir. 1991).

164. The State brought suit against the city to enforce the consent decree, after citizens filed the suit at issue on appeal.

165. 935 F.2d at 1353.

166. *Id.* "Beyond this one action, the state made no attempt to ensure compliance with the rest of the Assurance; instead it allowed the City numerous extensions." See *State Ex Rel. Prosser v. Indiana Waste Sys., Inc.*, 603 N.E.2d 181, 188-89 (Ind. Ct. App. 1992).

167. *STOP*, 973 F.2d 1320, 1324 (7th Cir. 1992).

168. 42 U.S.C.A. § 9659 (West Supp. 1993).

169. Section 9659(a)(1) and (2) allows citizens to bring civil actions "against any person . . . who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter," or "against

Regan v. Cherry Corp.,¹⁷⁰ the court reviewed CERCLA's legislative history bearing on citizen suits, and concluded that CERCLA did not authorize citizen suits to force potentially responsible parties to clean up waste sites:

[R]ather than create a duplicative private action for response costs, Congress intended to establish a citizens suit provision through which the public could prod the executive branch into zealously enforcing hazardous waste laws. In addition, Congress intended that [Section 9659] establish private attorneys general to supplement administrative action and aid in attacking CERCLA violators.¹⁷¹

In *Cadillac Fairview/California v. Dow Chemical Co.*,¹⁷² the Ninth Circuit held that 42 U.S.C. § 9606(a) did not provide a private cause of action for injunctive relief.

Thus, the citizens' role in enforcing CERCLA appears limited. According to the language of § 9659, citizens may only enforce settlements or cleanups *after* they have been agreed to or ordered, or force federal agencies to perform non-discretionary duties. Private parties may not initiate cleanups. CERCLA allows suit by a private party under § 9607(a) if that party has incurred actual response costs.¹⁷³ For a private party who does not (or cannot) actually incur response costs due to a hazardous waste site, prosecution under RCRA is the only federal means to achieve cleanup.

The Seventh Circuit's decision on diligent prosecution reflects a clear preference for large entities and interests, including the government. For example, the court's solicitude for the EPA's ability to make concessions¹⁷⁴ reflects a fear that if a citizen suitor like STOP can assert a claim against a silent partner of a penniless judgment debtor, "fear of this liability will lead" the silent partner "to fight to the death in the initial suit."¹⁷⁵ Why is this a bad result? If a complicated set of interrelated

the President or any other officer of the United States . . . where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter . . . which is not discretionary." *Id.*

170. 706 F. Supp. 145 (D.R.I. 1989).

171. *Id.* at 149. See also H.R. REP. NO. 253 (Pt. 3), 99th Cong., 2d Sess. 37 (1985), reprinted in 1986 U.S.C.C.A.N., 3038, 3060.

172. 840 F.2d 691 (9th Cir. 1988).

173. *E.g.*, *McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39, 43-44 (6th Cir. 1988); see also *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1154 (9th Cir. 1989).

174. *STOP*, 973 F.2d 1320, 1324 (7th Cir. 1992) ("An administrator unable to make concessions is unable to obtain them. A private plaintiff waiting in the wings then is the captain of the litigation.").

175. *Id.*

business organizations understands that a RCRA citizen plaintiff can prosecute an action even though the federal government has given up enforcing a judgment against one part of the set, perhaps the entire group would come forward and "fight to the death the first action." If the goal of RCRA litigation is to reduce or avoid environmental degradation, why should one be concerned with the fact that parties responsible appreciate the full scope of their exposure?

Finally, as the Four County Landfill litigation demonstrates, the court's solicitude for the government's position of primacy in environmental litigation rests on uncertain foundations. The Four County Landfill demonstrates, as well as any other failed federal enforcement action, how limited the government's resources actually are. It is this disjunction between the reality of the contaminated groundwater flowing from the Four County Landfill in the face of the government's actual enforcement abilities, on the one hand, and the Seventh Circuit's construction of "diligent prosecution," on the other, that calls for, as the court itself implicitly suggested, comprehensive revision of RCRA's citizen suit statute and all statutes like it.

Perhaps the court's decision is a reflection of distaste for environmental citizen suits. Even if one were to accept the argument that citizen suit statutes provide indirect subsidies to established environmental advocates or organizations,¹⁷⁶ STOP's efforts demonstrate that RCRA, at least, because of its essentially localized focus, should remain the tool of local communities to achieve some level of security in the face of environmental assaults on neighborhoods.

3. "*Nonadversarial*" *Presuit Notice*.—In the course of affirming the judgment, the Seventh Circuit described, but did not decide the appropriateness of, the district court's acceptance of a "nonadversarial" presuit notice.¹⁷⁷ No doubt it did not do so because its decision on res judicata permanently barred STOP from claiming imminent endangerment. On the other hand, the appellate court's description of the trial court's decision based on "nonadversariness" was sufficiently benign¹⁷⁸ to signal approval to anyone reading the district court's decision.¹⁷⁹

This notion of "nonadversariness" will not be found anywhere in RCRA's presuit notice provision:

176. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 386-91 (1990).

177. *STOP*, 973 F.2d at 1322-23.

178. *Id.* at 1322. "The district judge dismissed [STOP] II because Heritage still had not received the 90 days of *nonadversarial* time that the statute contemplates." *Id.* (Court's emphasis).

179. *STOP*, 760 F. Supp. 1338, 1340-42 (N.D. Ind. 1991).

No action [for imminent endangerment] may be commenced . . . prior to ninety days after plaintiff has given notice of the endangerment to —

- (i) the Administrator;
- (ii) the State in which the alleged endangerment may occur;
- (iii) any person alleged to have contributed or to be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste.¹⁸⁰

Insertion of a requirement of “nonadversariness” into this otherwise clear statutory language depends, as noted earlier, upon dictum in the Supreme Court’s opinion in *Hallstrom v. Tillamook County*.¹⁸¹ Almost at the end of its opinion the Supreme Court described Congress’ purpose in enacting RCRA’s notice provisions as to give “agencies and alleged violators a 60-day nonadversarial period to achieve compliance with RCRA regulations.”¹⁸² This was an interpretation of what Congress may have intended when it enacted § 6972. Given *Hallstrom*’s rather simple set of facts, the case did not anticipate the sort of long-running and complicated litigation that had engulfed the Four County Landfill for some five years. The issue in *Hallstrom* centered on the fact that neither EPA nor the State of Oregon had been given presuit notice of any kind.¹⁸³ From the point of view of Oregon and the EPA, suit had begun before either could involve itself in “compliance with RCRA regulations.” There was no “adversarial” period during which any form of notice had been given. In *STOP v. Heritage*, all parties were given statutorily sufficient notice “to achieve compliance with RCRA regulations” long before the imminent endangerment claim in STOP’s third complaint was commenced.¹⁸⁴

Hallstrom stands clearly for literal interpretation of § 6972.¹⁸⁵ But does it also stand for the proposition that its *own* language (“nonadversarial period”) — dictum on the facts of *Hallstrom* itself — must also be followed literally? Nothing in *Hallstrom* compels a conclusion of “nonadversariness” as an additional condition precedent to suit. To the contrary, almost immediately after its use of the words, “nonadversarial period,” the Supreme Court said: “Nor will the dismissal of this action have the inequitable result of depriving the petitioners of

180. 42 U.S.C. § 6972(b)(2)(A).

181. 493 U.S. 20 (1989).

182. *Id.* at 32.

183. *Id.* at 23-24.

184. Aug. 10, 1990, when notice of STOP’s third complaint was given, preceded November 20, 1990, the date when the complaint was filed, by 102 days. STOP Appendix at 203-04, 244-53.

185. *Hallstrom*, 493 U.S. at 25-26.

their 'right to a day in court.' (Citation omitted). Petitioners remain free to give notice and file their suit in compliance with the statute to enforce pertinent environmental standards."¹⁸⁶

In the bulk of cases, § 6972(b)(2)(A) should have the effect of giving those receiving notice an opportunity to render litigation unnecessary. On the other hand, Section 6972(b)(2)(A) does not appear to require an *absence* of litigation before a notice period may begin to operate. That, however, was the effect of the district court's decision on STOP's third complaint.¹⁸⁷ In the Four County Landfill litigation, factually related issues were litigated, nonstop, from 1987 through 1991. Should the existence of "factually related issues" in other cases preclude the possibility of giving citizen suit notice to anyone as to one or more of those related issues? Even if one were to assume that the "factually related issues" must at least involve the same parties, must the citizen suitor dismiss the earlier action before sending the notice? What if the earlier action involved different factual issues or claims under different environmental statutes? Will the Seventh Circuit's broad reading of "cause of action" be applied in this context?

What of the "immediate notice" for violation of hazardous¹⁸⁸ waste provisions allowed by §§ 6972(b)(1)(A) and (2)(A)? In *Dague v. City of Burlington*,¹⁸⁹ the Second Circuit had little difficulty holding that where a case involved claims subject both to the sixty-day notice and the immediate notice called for in § 6972(b)(1)(A) (as well as the ninety-day notice requirement in § 6972(b)(2)(A)),¹⁹⁰ failure to comply with the sixty/ninety day notice requirements was excused by the fact that immediate notice had been given.¹⁹¹

The court set the issue in these terms:

186. *Id.* at 32.

187. *STOP*, 760 F. Supp. 1338, 1342 (N.D. Ind. 1991).

188. *E.g.*, 42 U.S.C. § 6972(b)(2)(A):

(2)(A) No action [for imminent endangerment] may be commenced . . . prior to ninety days after the plaintiff has given notice of the endangerment. . . . [E]xcept that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of [the hazardous waste provisions of RCRA].

189. 935 F.2d 1343, 1349-52 (2d Cir. 1992), *rev'd on other grounds*, 112 S. Ct. 2638 (1992).

190. *Id.* at 1349-50. The case actually involved a fourth notice requirement: the 60-day notice in 33 U.S.C. § 1365(a).

191. *Dague*, 935 F.2d at 1352. The court said, in this context, "Although the Supreme Court's language in *Hallstrom* leans toward a strict application of the notice and delay requirement, rigid adherence in this case, which involves hazardous wastes, would lean too far, for it would circumvent congress's intent in enacting these statutes." *Id.*

[P]laintiffs' hazardous waste claims in Count I (subchapter III violations) could be brought immediately after giving notice to the administrator of the EPA, the state and the alleged violator. The remaining question, therefore, is whether the notice and delay requirements apply when allegations of subchapter III violations are combined with non-subchapter III claims in a single "hybrid" complaint. Neither Congress nor the Supreme Court in *Hallstrom* addressed the problems associated with this type of "hybrid" situation.¹⁹²

The Second Circuit approved the lower court's analysis that, where a hazardous waste claim had been properly filed immediately after notice pursuant to § 6972(b)(1)(A), the plaintiff need neither to defer commencement of the whole action until the longer notice periods had been fulfilled, nor seek leave to amend the complaint to include claims requiring greater notice after their notice periods had run.¹⁹³ It is readily apparent from the Second Circuit's approach to the problem of "hybrid" RCRA claims that, when a claim properly follows an immediate presuit notice, no "nonadversarial" period for the other related claims would be required by either the statute or the holding in *Hallstrom*. At least one district court has followed this aspect of *Dague* as it concluded that a RCRA notice of a claim later added to a then pending action would not be rejected because it had been given during an "adversarial" period.¹⁹⁴

Because the Seventh Circuit did not actually hold *STOP* must give "nonadversarial" notices under RCRA, this issue, at least, may be open in this circuit for further argument. Given the court's attitude in *STOP v. Heritage*, however, it is likely, in the absence of legislative clarification, that the court will require "nonadversarial" notice in future cases.

E. Epilogue

As can readily be seen, *STOP*'s part in the Four County Landfill ended not with a bang, but with a whimper. But while *STOP* failed, its travails as it attempted to make use of an environmental citizens' suit statute may help others to avoid the pitfalls that led to its ultimate loss of victory. At the very least, what the courts have done to RCRA's citizen suit statute by interpretation may help Congress to review the

192. *Id.* at 1351.

193. *Id.* at 1351-52.

194. *Zands v. Nelson*, 779 F. Supp. 1254, 1258-61 (S.D. Cal. 1991). The court specifically rejected the district court's decision in *STOP*, 760 F. Supp. 1338, 1340-42 (N.D. Ind.), on this point.

environmental citizen suit so that ordinary people may do what, as in this case, the federal government will not, or cannot, do.

As of February 19, 1993, no remediation of the Four County Landfill has occurred. The State of Indiana is spending, on average, \$90,000 per month to remove leachate from, and repair the eroding surface of, the Four County Landfill. Negotiations among generators of waste deposited at the landfill to achieve some form of cleanup are still ongoing.¹⁹⁵ EWC's bankruptcy appears close to liquidation as it approaches the end of its fourth year, the \$2 million in cash having been consumed in various carrying costs.¹⁹⁶ RUI's motion to collect \$430,000 from EWC's estate based on its secured claim has not been decided yet.¹⁹⁷

III. FLOOD PLAINS REGULATION AND THE TAKINGS CLAUSE

Indiana's current Flood Control Act was enacted in 1987.¹⁹⁸ Pursuant to Indiana Code section 13-2-22-13(a) one may not maintain "in or on any floodway a permanent structure for use as an abode or place of residence."¹⁹⁹ Floodway is defined as, "the channel of river or stream and those portions of the flood plains adjoining the channel, which are reasonably required to efficiently carry and discharge the flood water or flood flow of any river or stream."²⁰⁰ Indiana Code section 13-2-22-13(b) excludes far more than just residences from floodways. It makes unlawful the presence of:

[A]ny structure, obstruction, deposit, or excavation in or on any floodway . . . which will adversely affect the efficiency of, or unduly restrict capacity of, the floodway, or, . . . will constitute an unreasonable hazard to the safety of life or property, or result in unreasonably detrimental effects upon the fish, wildlife, or botanical resources²⁰¹

All such structures, obstructions, etc., are declared by subsection (b) to be public nuisances.²⁰²

195. Telephone Interview with Patricia Carrasquero, Section Chief, SuperFund, Indiana Department of Environmental Management (February 19, 1993).

196. *EWC*, 131 B.R. 410, 416 (N.D. Ind. 1991).

197. *In re Environmental Waste Control, Inc.*, No. S92-00478M (N.D. Ind. 1992).

198. 1987 Ind. Acts ch. 34, § 73 amended by 1990 Ind. Acts ch. 102, § 1; 1990 Ind. Acts ch. 28, § 6; 1991 Ind. Acts ch. 124, § 1. The predecessor to this legislation was enacted in 1945. 1945 Ind. Acts ch. 318, § 15.

199. IND. CODE § 13-2-22-13(a) (Supp. 1992). The prohibition of residences in floodways is subject to a number of exceptions set forth in subsections (a)(2) and (3).

200. *Id.* § 13-2-22-3(12) (1988).

201. *Id.* § 13-2-22-13(b) (Supp. 1992).

202. *Id.*

The Director of the Department of Natural Resources (DNR),²⁰³ is authorized to execute the Act by various means including investigations²⁰⁴ and eminent domain.²⁰⁵ Finally, subparagraph (d) of Indiana Code section 13-2-22-13 provides that the Director of the Department of Natural Resources may issue permits to construct a structure, obstruction, deposit or excavation in a floodway or improve an existing residence (within established limits), if the Director is of the opinion that the,

[A]pplicant has clearly proven that the structure, obstruction, deposit, or excavation will not adversely affect the efficiency of, or unduly restrict the capacity of, the floodway, will not constitute an unreasonable hazard to the safety of life or property, and will not result in unreasonably detrimental effects upon fish, wildlife, or botanical resources.²⁰⁶

In *Indiana Department of Natural Resources v. United Refuse Co., Inc.*,²⁰⁷ the Department refused to grant a permit to the operator of a solid waste landfill to expand its operations adjacent to a stream called "Junk Ditch" in Allen County. After denial of the permit, the landfill operator sought administrative review, which culminated in a final order that confirmed the permit denial. The landfill operator sought judicial review. The trial court reversed the order and the Department appealed. While several issues were presented on appeal, one bears directly on the environmental aspects of the case, although it comes in the form of an administrative procedural issue.

The appellate court concluded that the trial court improperly imposed upon the Department in the administrative hearing the burden of proving that the permit should not be granted. The issue was a matter of first impression.²⁰⁸ The court held that Indiana Code section 13-2-22-13(d)(2) intended that the permit applicant "is to bear the burden of showing that all requirements for a permit's issuance are met."²⁰⁹ The court held that the administrative law judge properly found that the landfill operator had failed to prove "that no harm would come to fish, wildlife or botanical resources"²¹⁰ as a result of its project.

203. The Director of the Department of Natural Resources fulfills these and other licensing functions formerly carried out by the Commission. *Id.* § 14-3-3-24(b) (Supp. 1992).

204. *Id.* § 13-2-22-7 (1988).

205. *Id.* § 13-2-22-10 (1988). See generally IND. CODE §§ 13-2-22-11 and 13-2-22-13(c) (1988 & Supp. 1992).

206. *Id.* § 13-2-22-13(d) (Supp. 1992).

207. 598 N.E.2d 603 (Ind. Ct. App. 1992).

208. *Id.* at 605.

209. *Id.*

210. *Id.* at 606.

The court's decision is consistent with the clear letter of the statute. What is remarkable about the statute itself is the strictness of the burden of proof it establishes when combined with the discretion that the Department has in issuing any permit.

On the other hand, another 1992 case demonstrates that this legislation is not as draconian in effect as some of its provisions may appear on their face. In *State v. Adams*,²¹¹ the defendant owned land that included a stream. Large amounts of rock, gravel, and other debris collected in the stream, especially after heavy rains and consequent floods. Adams excavated this creek rock and gravel but did not excavate the natural creek bed. The State informed Adams that he was required to obtain a permit to continue the excavation and prosecuted him for an infraction under Indiana Code section 13-2-22-13(h)²¹² after Adams refused to do so. The trial court found the defendant guilty but then granted his motion to correct errors. The State appealed. The court of appeals affirmed. It held that since Indiana Code section 13-2-22-13(b) makes unlawful an "excavation" which will "adversely affect the efficiency of, or unduly restrict capacity of the floodway."²¹³ the trial court's conclusion that Adams' conduct "was consistent with the purposes of the statute" was correct:

Adams removed accumulated rocks and debris and did not excavate the natural stream bed. He did not alter the present water course of the stream. Granted, the rocks and debris were placed in the stream by acts of nature and, when he removed them, Adams thereby arguably altered the "natural" course of the stream. However . . . Adams removed obstructions which would likely have increased the likelihood of and damage from a flood. This is the very event the statute seeks to prevent.²¹⁴

Implicit in the court's conclusion is a recognition of priorities among the interests the Legislature intended to promote by way of Indiana Code section 13-2-22-13(b). A floodway has, as its obviously primary function, channeling flood waters so that they do not expand beyond the floodway itself. In order to avoid "unreasonable hazards to the safety of life or property"²¹⁵ most structures or obstructions are either

211. 583 N.E.2d 799 (Ind. Ct. App. 1992)

212. Section 13-2-22-13(h) provides in relevant part:

[A] person who fails to:

(2) obtain a permit under subsection (d); commits a Class C infraction. Each day a person violates subsection . . . (d) constitutes a separate infraction.

IND. CODE § 13-2-22-13(h) (Supp. 1992).

213. *Adams*, 583 N.E.2d at 800.

214. *Id.* at 801.

215. IND. CODE § 13-2-22-13(b).

to be removed or not constructed at all.²¹⁶ As a result of Indiana Code chapter 13-2-22, generally speaking, floodways governed by the Act will tend to be vacant and therefore will be available as a site of fish, wildlife, or botanical resources. However, as the court's decision in *Adams* seems to reflect, natural accretion of flood debris, which may enhance fish, wildlife or botanical resources, will not be given priority over the floodway's ability to receive and enable flood waters to pass through with efficiency and safety. Human needs come first.

However, *McIntyre v. Guthrie*²¹⁷ sheds a good deal of doubt on the trial court's conclusion in *Adams* that the defendant's excavations fulfilled the intent of the Flood Control Act. The first *McIntyre* case involved a DNR permit that authorized upstream landowners' clearing and changing a stream bed. The court held that downstream riparian landowners who claimed the authorized work had injured their property were not required to exhaust administrative remedies triggered by Indiana Code section 13-2-22-22 before suing upstream permit holders because the statute did not provide them with an administrative remedy.²¹⁸ As a result, in the second *McIntyre* case, the downstream owners sued the permit holder for injunction and damages. The court of appeals affirmed an award of damages against the permit holder due to changes that caused an increase in the flow of water resulting in additional property erosion.²¹⁹ The court specifically held that the fact that the upper owners had been granted a permit to clear the banks of the creek relieved them of no liability under the circumstances:

The [upper owners] do not point to, nor does our research reveal, any authority granting the DNR the authority to limit or preclude civil liability simply by approving action under the Flood Control Act. Because this case concerns the [lower owners'] private property rights, as opposed to Flood Control Act violations, the DNR permit provides no grounds for reversal.²²⁰

Possibly had the defendant's excavations in *Adams* caused injury to downstream riparian owners, the trial court's ruling might have been different. *Adams* and *McIntyre* together provide a small example of how environmental cases tend to present greater problems of unintended

216. See also *id.* § 13-2-22-13(a) and (f). (The latter subsection authorizes the director to remove or eliminate any structure, obstruction, deposit or excavation in any flood way meeting certain conditions).

217. 596 N.E.2d 979 (Ind. Ct. App. 1992); *Guthrie v. McIntyre*, 563 N.E.2d 651 (Ind. Ct. App. 1990).

218. 563 N.E.2d at 652.

219. 596 N.E.2d at 981-82.

220. *Id.* at 983.

consequences than other areas of litigation. The answer to this tendency toward diffuse consequences is not necessarily more administrative decision-making; rather, part of the answer might be found in expanding litigant and judicial consciousness to include greater awareness of how environmental issues impinge on, and interact with, the law.

Returning to the *McIntyre* cases, could the downstream owners assert a private claim against the upstream defendants (assuming they had no DNR permit) for having violated Indiana Code section 13-2-22-13(b)? The answer appears to be "no." Although it has no bearing on floodway regulation, but rather involves the extension of riparian rights into the waters of Indiana fresh water lakes, the court in *Zapffe v. Srbeny*,²²¹ was presented with the question of whether Indiana Code section 13-2-11.1-2²²² implied a private cause of action against one who violated it. The court held, both forthrightly and quite broadly, that none of Title 13 provides a private right of action.²²³ On the other hand, a private litigant might make use of the citizen suit provision²²⁴ to prod the State into enforcing the Flood Control Act (or other provision in Title 13) in a particular case.

While the *Town of Beverly Shores v. Bagnall*,²²⁵ does not involve the Flood Control Act, it presents a factual situation that provides an appropriate setting for a discussion of the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Council*.²²⁶ As will be seen, *Lucas* is likely to inspire a good deal of litigation over regulatory takings, including, but by no means limited to Indiana's regulation of floodways.

In *Town of Beverly Shores v. Bagnalls*, the Bagnalls owned a fifty foot-wide, 275-foot-deep lot located on a sand dune which they intended to level in order to build a house. Other houses had been built on fifty-foot-wide lots in the past, but apparently before a 1982 ordinance forbade constructing houses on undersized lots and lots less than 100 feet in width. After the building commissioner denied the Bagnall's application for a building permit, because the lot was undersized and too narrow, they sought a variance from the Board of Zoning Appeals (BZA). The BZA also denied the application. The Bagnalls filed suit and won a judgment in the trial court. Among a number of conclusions adverse to the BZA's refusal to grant a variance, the trial court held that it constituted a taking of the Bagnall's property.²²⁷ The court's conclusion

221. 587 N.E.2d 177 (Ind. Ct. App. 1992).

222. IND. CODE § 13-2-11.1-2 (1988).

223. *Zapffe*, 587 N.E.2d at 181.

224. IND. CODE § 13-6-1-1 (Supp. 1992).

225. 590 N.E.2d 1059 (Ind. 1992).

226. 112 S. Ct. 2886 (1992).

227. 570 N.E.2d 1363, 1368 (Ind. Ct. App. 1991).

was apparently based on the fact that the plaintiff's property was zoned residential and could be used for no other purpose.²²⁸

On the town's appeal the judgment was affirmed, but remanded to allow the board either to "compensate the property owner for the taking or grant the petitioner's requested relief."²²⁹ The dissent argued that the trial court substituted its discretion for the board's decision to preserve the Indiana Dunes.²³⁰ The supreme court granted transfer and reversed.²³¹ The court stated it would avoid the takings issues because the BZA's decision could be supported by another local ordinance dealing specifically with protection of dune property.²³² In that context the court said:

We agree with the trial court that peveling a sand dune cannot be said to be injurious to the public health. Nor can we imagine even the most enthusiastic environmentalist arguing with a straight face that leveling the dune would leave the populace imperiled or undermine public morality. On the other hand, we find nothing "vague" about the BZA's finding that damage to existing topography is contrary to the "general welfare."²³³

In effect, the landowner's permit application did not respond to remediation requirements in an ordinance the BZA did not cite in its own findings.

Having shored up the legislative basis for the BZA's permit denial, the court provided two reasons for not confronting the constitutional issue: first the Bagnalls' failure to provide plans in compliance with the Dune topography ordinance and, second, the principle that courts will not decide cases on constitutional issues when they can be resolved on other grounds.²³⁴ The court explained its ruling:

We do not wish to imply, however, that *any* denial of a building permit for the Bagnalls would pass constitutional muster. We simply cannot tell from the record whether the board, if presented

228. *Id.*

229. *Id.* at 1369.

230. *Id.* at 1370. "The town of Beverly Shores is part of the Indiana Dunes National Lakeshore, a national park extending along the shoreline of southern Lake Michigan. Authorization of the park in the 1960s culminated a 50-year fight to save the dunes from the encroachment of industrialization. The area is a highly unique and richly diverse ecosystem which prompted the poet Carl Sandburg to write, 'The dunes are to the Midwest what the Grand Canyon is to Arizona and the Yosemite is to California. They constitute a signature of time and eternity.'" *Id.*

231. *Town of Beverly Shores v. Bagnall*, 590 N.E.2d 1059 (Ind. 1992).

232. *Id.* at 1062-63.

233. *Id.* at 1063.

234. *Id.*

with a petition to construct a home under plans which would protect the dune, would deny the petition solely on grounds that the lot does not conform to the width and square footage requirements of the 1982 ordinance. . . .

[W]e . . . do not know whether the Bagnalls will be denied *any* use of their property, since they have not sought approval for plans which might mitigate damage to the dune. There is thus no basis upon which to resolve a takings claim.²³⁵

The court's resolution of the issue the Bagnalls presented leaves the takings question quite unclear. If the Bagnalls present the town with plans designed to mitigate adverse impact on a dune within a fifty foot wide lot, will the Town be required to issue the permit or pay the Bagnall's the value of their property?

In *Lucas v. South Carolina Coastal Council*, a case involving development of a barrier island, the Supreme Court held that if a state regulation causes private property to be without economic value, the state will be required to make just compensation under the takings clause, no matter what the State's basis for the regulation is.²³⁶ The Court's decision is not quite so rigorous as first appears, since it took pains to make clear how seldom a regulation should remove all economic value. Quoting Justice Holmes' opinion that began the Supreme Court's jurisprudence on takings by regulation (rather than physical invasion), *Pennsylvania Coal Co. v. Mahon*,²³⁷ Justice Scalia wrote,

And the *functional* basis for permitting the government, by regulation, to affect property values without compensation — that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," . . . does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.²³⁸

How Indiana courts will address regulatory takings claims in view of *Lucas*, of course remains to be seen. A few courts have dealt with regulatory takings claims in terms of *Lucas*.²³⁹ Returning specifically to

235. *Id.* at 1063-64.

236. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893-95 (1992). The court does recognize an exception where "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 2899.

237. 260 U.S. 393, 413 (1922).

238. *Lucas*, 112 S. Ct. at 2894.

239. *Rehard v. Lee County*, 968 F.2d 1131, 1134-36 (11th Cir. 1992) (40-acre undeveloped parcel of waterfront land); *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1383-90 (N.J. 1992) (quarry); *Stevens v. City of Cannon Beach*, 835 P.2d 940 (Or. Ct. App. 1992) (lots on "dry sand area" of beach front).

floodway regulation, the Supreme Court in *First Luthern Church v. Los Angeles County*²⁴⁰ dealt with flood plain regulation in the context of a claim of a temporary taking.²⁴¹ The court held that a temporary taking was compensable.²⁴² However, because the case had come up to the Supreme Court on the pleadings, the matter was remanded for a determination whether, in fact, the landowner had been "denied all use of its property for a considerable period of years."²⁴³ On remand the California Court of Appeals concluded that the flood control ordinance was a valid exercise of police power²⁴⁴ and it did not take away all the use of the owner's property.²⁴⁵ It is unclear whether the California court's approach to the property owner's alleged loss of all utility would pass muster under the rule announced in *Lucas*. The court seemed to argue that appropriateness of the flood control measure was so clear that the property owner's interests, whatever they might be²⁴⁶ must take second place. Given the Supreme Court's emphasis on economic values, future plaintiffs may well have greater success against flood plain regulations, no matter how clear the danger or how appropriate the legislation may be.²⁴⁷

IV. CONCLUSION

As Indiana and the rest of the country come to grips with the implications of full economic development, and possibly over-develop-

240. 482 U.S. 304 (1987).

241. The regulation provided that "[a] person shall not construct, reconstruct, place or enlarge any building or structure, any portion of which is, or will be, located within the outer boundary lines of the interim flood protection area located in Mill Creek Canyon." *Id.* at 307.

242. *Id.* at 317-20.

243. *Id.* at 321-22.

244. *First English Evangelical Luthern Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 898-901 (Cal. Ct. App. 1989), *cert. denied*, 493 U.S. 1056 (1990).

245. 258 Cal. Rptr. at 901-06.

246. The court decided the matter, again, on the pleadings. The court described the plaintiff's allegation of loss of use:

True, the complaint *alleges* [the ordinance] denies First English "all use" of Lutherglen. But as will be seen shortly, the ordinance *does not* deny First English "all use" of this property. It does not even prevent occupancy and use of any structures which may have survived the flood. It only prohibits the reconstruction of structures which were demolished or damaged by the raging waters and the construction of new structures. In no sense does it prohibit uses of this campground property which can be carried out without the reconstruction of demolished buildings or the erection of new ones.

Id. at 902.

247. See *Powers v. Skagit County*, 835 P.2d 230, 236 (Wash. Ct. App. 1992) (Dismissal reversed in order to allow property owner to show flood plain regulation rendered his land capable of no economically viable use).

ment in terms of its impact on our physical environment, some basic questions have arisen or at least approach national consciousness. If the fundamental purpose of the Commerce Clause was to achieve a fully developed national economy, and if that full development has been achieved, have we reached the point where we should consider re-defining what commerce is? Has the time come to balance the policy of supporting economic exploitation of natural resources by placing an independent value in natural resources themselves? Is it possible to re-define notions of commerce so that local protection of natural conditions, including natural resources, can be preserved from economic exploitation generated from outside a locality's boundaries? If our system is incapable of flexibility when it comes to a 200 year gloss on the Commerce Clause, then, is it likely that the country will witness increased multi-state regional politics akin to the regional politics that marked the era that preceded the Civil War? Is the Great Lakes organization of states and Canadian provinces a foretaste of things to come?

Moving on to individual citizens' relationship to their environment, whether natural or man-made, have they, with the rise of larger and larger governmental and corporate structures, lost the ability to control any part of that environment? Has the command and control form of regulation the Environmental Protection Agency administered over the last twenty years or so promoted a national sense that the federal government will effectively protect and promote environmental goals and values? If one doubts whether the command and control approach to environmental regulation can ever be "successful" (given the government's past record of incapacity to deal with the multitude of environmental problems its jurisdiction encompasses), why should citizens not have substantially freer access to the courts than the multitude of discordant citizen suit provisions now allow? Is it time for a comprehensively revised uniform environmental citizen suit statute to be enacted?

Finally, turning to the regulation of land, in order to preserve "environmental" values, is the notion of what "property" is at risk? Before this question may be answered, are property interests to be defined in terms of the lifetime of the current owner or can they (or should they) be defined in terms of the property's value over the total time of its potential utility? As this country reaches a point of full economic development and possibly over-development, is it time for the definition of property rights to be reconsidered in terms of an "economic" analysis that is not limited to the current market but, rather, includes, as it did in earlier times, future generations as a present interest group? If it is attempted, can such reconsideration be achieved without harm to the letter and spirit of the takings clause?

1992 was a dynamic year for "environmental" law in Indiana. Indiana, however, merely reflects what is happening across the country.

As traditional notions of “environmental regulation” are shown in the cases to be, in various ways, insufficient to the task, much deeper themes involving cultural and attitudinal changes about established constitutional premises may be approaching the stage of discourse

Evidence: Indiana Moves Toward Adoption of the Federal Rules

IVAN E. BODENSTEINER*

The most significant development in Indiana law of evidence in 1992 is the Indiana Supreme Court's clear indication that it will soon adopt the Federal Rules of Evidence, or something comparable. The Indiana Supreme Court's movement toward the Federal Rules is indicated by a number of its decisions and its order of November 4, 1992, establishing "an *ad hoc* committee to study and propose for adoption by this Court written rules of evidence for use in the trial courts of this state."¹ As indicated in this order, it is anticipated that the court will adopt the rules to take effect on January 1, 1994.

Several weeks before ordering the establishment of the *ad hoc* committee, the Indiana Supreme Court demonstrated a willingness to conform Indiana law to the Federal Rules of Evidence by adopting Rule 404(b), one of the more controversial federal rules. In *Lannan v. State*,² the court granted a transfer in order to re-examine the "depraved sexual instinct" exception to the general rule excluding character evidence, such as prior bad acts, offered solely to indicate a propensity to act in conformity with those acts.³ Lannan, who was convicted of sexually molesting a young girl, challenged the admission of testimony from the victim regarding uncharged instances of molestation and the testimony of another girl who also accused Lannan of molesting her.⁴ Although the supreme court held that the evidence of an alleged incident between the victim and Lannan in Lannan's truck a year before the charged incident was improperly admitted, it affirmed Lannan's conviction because the impact of the earlier incident "was not of sufficient weight to require reversal."⁵ The court noted that evidence that Lannan fondled the victim's cousin just prior to having intercourse with the victim was

* Professor of Law, Valparaiso University School of Law. B.A., 1965, Loras College; J.D., 1968, University of Notre Dame.

1. This order establishes a committee with 28 members divided into four 4 regions. Each region was assigned a number of articles of the Uniform Rules of Evidence and was to submit a written report of recommendations and comments to the court by Feb. 28, 1993. The chair of each regional committee and Justice Krahulik will constitute a subcommittee with responsibility for reviewing the regional reports and submitting a final report to the Indiana Supreme Court.

2. 600 N.E.2d 1334 (Ind. 1992).

3. *Id.* at 1335.

4. *Id.*

5. *Id.* at 1341.

properly admitted under the theory of *res gestae*, “under which the state is allowed to present evidence that completes the story of the crime in ways that might incidentally reveal uncharged misconduct.”⁶

Before holding that evidence of the prior incident was inadmissible under Rule 404(b), which the court “adopt[ed] in its entirety,”⁷ the court rejected the “depraved sexual instinct” exception.⁸ It rejected the “depraved sexual instinct exception” after examining the reasons supporting it, which include the high rate of recidivism and the need to bolster the victim’s testimony.⁹ The court agreed that recidivism is high among sexual deviates but declared that recidivism alone does not justify deviating from the general rule, which excludes such evidence of prior incidents on the basis that its prejudicial effect outweighs its probative value.¹⁰ Even though recidivism is high in other areas of crime, such as illicit drug use, no similar exception is permitted in those areas.¹¹

The court stated that the second rationale—the need to bolster the victim’s testimony because of a perceived general view that adult males simply would not sexually molest a child—is not a sufficient justification for the exception, because unfortunately we now “live in a world where accusations of child molest no longer appear improbable as a rule.”¹² Although expressing sympathy for child victims of sexual molestation, the court was unwilling to abandon a “basic tenet of criminal evidence law” that guards against conviction and punishment of individuals because of their bad character.¹³

Rejection of the “depraved sexual instinct” exception and adoption of Rule 404(b) certainly does not mean that evidence of prior sexual misconduct will always be excluded in sexual abuse cases. Although

6. *Id.* at 1339.

7. *Id.* The court’s willingness to adopt portions of the Federal Rules on a case-by-case basis is evident in earlier decisions. *See, e.g.,* Thomas v. State, 580 N.E.2d 224 (Ind. 1991) (addressing Rule 803(b)(3) and the admissibility of statements against penal interest); Modesitt v. State, 578 N.E.2d 649 (Ind. 1991) (rejecting the hearsay rule adopted in Patterson v. State, 324 N.E.2d 482 (Ind. 1975), in favor of portions of Rule 803(d)). In *Modesitt*, the court expressly stated that its ruling does not apply retroactively, and therefore some cases are still applying *Patterson*. *See, e.g.,* Schumpert v. State, 603 N.E.2d 1359, 1362-63 (Ind. Ct. App. 1992). *Cf.* Moran v. State, 604 N.E.2d 1258, 1260-62 (Ind. Ct. App. 1992) (adding that under *Modesitt*, testimony of a caseworker regarding a statement of a sexual abuse victim, offered during rebuttal to bolster the victim’s credibility, was inadmissible hearsay).

8. *Lannan*, 600 N.E.2d at 1335-37.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 1337.

13. *Id.* at 1338.

evidence of prior acts can no longer be admitted to show action in conformity with the prior misconduct, it might be admissible for other purposes under Rule 404(b). Rule 404(b) provides:

(B) OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.¹⁴

After adopting Rule 404(b), the supreme court in *Lannan v. State* summarily concluded that evidence of the prior incident in Lannan's truck was not admissible under Rule 404(b).¹⁵ It is difficult to evaluate this conclusion absent a record of an attempt by the prosecution to fit the evidence within Rule 404(b). Although the "depraved sexual instinct" exception was available, the prosecutor obviously had little incentive to seek admission under Rule 404(b). However, the court's conclusion that the evidence was not admissible under Rule 404(b) "without forcing a square peg in a round hole"¹⁶ seems correct.

The new Indiana rule announced in *Lannan* will apply to cases pending on the date it was decided, October 16, 1992, and all cases thereafter. A case decided the same day as *Lannan*, *Pirnat v. State*,¹⁷ was remanded by the supreme court for reexamination in light of the holding in *Lannan*, because "Pirnat's appeal is currently pending as this new rule is announced."¹⁸ Presumably, much evidence of prior bad acts—formerly admissible under the "depraved sexual instinct" exception—will not be excluded under Rule 404(b), because the prosecution will be unable to fit such evidence under the "other purposes" provision of Rule 404(b).

14. FED. R. EVID. 404(b).

15. *Lannan*, 600 N.E.2d at 1341. Cf. *Schumpert v. State*, 603 N.E.2d 1359, 1361-62 (Ind. Ct. App. 1992) (In applying Rule 404(b), the court held that evidence of several prior, similar robberies was admissible under "common scheme or plan" exception to prove identity).

16. *Id.*

17. 600 N.E.2d 1342 (Ind. 1992).

18. *Id.*

Attorneys representing the accused in criminal cases should take advantage of the notice provision in Rule 404(b), which was added to the Federal Rules of Evidence by a 1991 amendment. Pursuant to this provision, the prosecution "shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."¹⁹ However, the prosecution must provide notice only upon request by the accused.²⁰ Therefore, defense counsel in criminal cases should routinely make such a request at an early stage in the proceedings. In addition, upon learning of the prosecutor's intent to use evidence of prior bad acts, the defense counsel may want to file a motion in limine to challenge use of such evidence. When the accused properly requests notice of the prosecutor's intent to use evidence of prior bad acts, such evidence "is inadmissible if the court decides that the notice requirement has not been met."²¹ Although the notice provision in Rule 404(b) does not apply in civil cases, similar information is normally obtainable through discovery and other pretrial proceedings.

The Indiana Supreme Court's rejection of the "depraved sexual instinct" exception is a clear victory for the defense in criminal cases. However, the court's adoption of Rule 404(b) in *Lannan* is certainly not a defeat for the prosecution.²² Although the first sentence of Rule 404(b) clearly prohibits the use of prior crimes or bad acts "to show action in conformity therewith," this rule of exclusion is substantially undermined by the second sentence, which makes such evidence admissible for "other purposes."²³ The concern of the accused is that a creative prosecutor can frequently avoid the general prohibition and convince the court to admit evidence of prior crimes or bad acts under the guise of "other purposes," knowing that the jury may improperly use the evidence to establish guilt in the case. Certainly, evidence of prior crimes or bad acts makes the accused more "convictable" in the eyes of most jurors. Due to this significant danger of jury misuse of such evidence, the courts in Indiana should exercise caution in admitting such evidence under Rule 404(b).

19. FED. R. EVID. 404(b).

20. *Id.*

21. FED. R. EVID. 404(b) advisory committee's note.

22. Aside from the rejection of the "depraved sexual instinct" exception, the Indiana Supreme Court's adoption of Rule 404(b) will not substantially change the law in Indiana as developed through a series of cases. See *Gibbs v. State*, 538 N.E.2d 937 (Ind. 1989); *Penley v. State*, 506 N.E.2d 806 (Ind. 1987). See generally J. ALEXANDER TANFORD & RICHARD M. QUINLAN, INDIANA TRIAL EVIDENCE MANUAL § 48.9 (2d ed. 1987 & Supp. 1992).

23. FED. R. EVID. 404(b).

A 1991 report of the Trial Evidence Committee of the American Bar Association Section of Litigation addresses some of the problems in applying Rule 404(b).²⁴ According to the ABA report, the “greatest problem” with Rule 404(b) “is the tendency some courts have to permit prosecutors to rely on a ‘laundry list’ of reasons for offering other act evidence.”²⁵ The notice provision added in 1991 should help to alleviate this problem, because, if properly used by the defense in combination with a motion in limine, trial courts can require the prosecution to “articulate with precision the use it seeks to make of the evidence and the inferences it seeks to have the trier of fact draw.”²⁶ Other issues identified in the American Bar Association report relate to the appropriate standard of proof to apply in determining whether the prior act occurred, whether the judge or the jury determines if the prior act did in fact occur, and whether the other purpose for which the prior crime or bad act is offered must be in dispute.²⁷

Some of the above-mentioned issues have been addressed by the United States Supreme Court. The Court explained in *Huddleston v. United States*²⁸ that the threshold inquiry in determining the admissibility of the prior act under Federal Rule 404(b) “is whether that evidence is probative of a material issue other than character.”²⁹ In other words, the prosecution must show that the offered evidence is probative of one of the “other purposes” allowed by Rule 404(b). If the trial court determines that the prior act evidence is probative of a material issue other than character, it is important to note that it is still not relevant unless “the jury can reasonably conclude that the act occurred and the defendant was the actor.”³⁰ Under the Federal Rules of Evidence, such questions of relevance conditioned on fact are governed by Rule 104(b), which requires the trial court to admit the evidence “upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.”³¹ Therefore, the Court in *Huddleston* rejected the defense’s argument that evidence of a prior act is admissible only after the prosecution presents sufficient evidence for the court to make a preliminary finding that the act occurred based on the prepon-

24. David A. Schlueter, *Emerging Problems Under the Federal Rules of Evidence*, A.B.A. SEC. OF LIT. (2d ed. 1991).

25. *Id.*

26. *Id.*

27. *Id.*

28. 485 U.S. 681 (1988).

29. *Id.* at 686.

30. *Id.* at 689.

31. FED. R. EVID. 104(b).

derance standard.³² Rather, the trial court "simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence."³³ Rejection of a higher standard of proof, such as the clear and convincing evidence standard, was based on the Court's earlier decision in *Bourjaily v. United States*,³⁴ which held that preliminary factual findings under Federal Rule 104(a) are governed by the preponderance of the evidence standard.³⁵

Recognizing the concern that unduly prejudicial evidence might be introduced under Rule 404(b), the Court in *Huddleston* suggested that other sources provide sufficient protection against such unfair prejudice. The other sources of protection are:

first, . . . the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, . . . the relevancy requirement of Rule 402 — as enforced through Rule 104(b); third, . . . the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, . . .; and fourth, . . . Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.³⁶

The Court's recognition in *Huddleston* of Federal Rule 403's applicability is important in that it may provide the best defense against admission of prior crimes or bad acts under Rule 404(b).³⁷

Whether the prosecution can offer evidence of prior crimes or bad acts for "other purposes" that are not in dispute is not clear under Rule 404(b). The American Bar Association report suggests that "[a]s a general rule, . . . evidence of matters not disputed, especially prejudicial evidence, ought not to be readily accepted."³⁸ This view makes sense, particularly if one accepts the "basic tenet of criminal evidence law older than the republic itself [that prohibits] . . . the state from offering character evidence merely to show the defendant is a 'bad guy' and therefore probably committed the crime with which he is charged."³⁹

32. *Huddleston*, 485 U.S. at 685-89.

33. *Id.* at 690. See *Parker v. State*, 425 N.E.2d 628, 633 (Ind. 1981) (A prior act is admissible to prove identity "if the two incidents are sufficiently similar to support an inference that the same person committed both, and if the defendant is shown to have perpetrated the [prior act].").

34. 483 U.S. 171 (1987).

35. *Id.* at 176.

36. *Huddleston*, 485 U.S. at 691-92.

37. Indiana law is similar to Rule 403. See TANFORD & QUINLAN, *supra* note 22, §§ 48.4-48.6.

38. Schlueter, *supra* note 24.

39. *Lannan v. State*, 600 N.E.2d 1334, 1338 (Ind. 1992).

Requiring an actual dispute on the issue for which the prior acts evidence is offered under Rule 404(b) is consistent with *Burch v. State*,⁴⁰ in which the Indiana Court of Appeals held that evidence of identity is “highly relevant” when the accused relies upon an alibi defense.⁴¹ If an issue is not in dispute, then evidence relating to that issue cannot be “highly relevant.”

While the government is presenting its case in chief, it is sometimes unclear whether or not an issue will be contested. However, if the accused objects to the introduction of evidence under Rule 404(b), either at trial or in a pretrial motion in limine, the court can require the government to identify the specific issue for which the evidence is being offered and then ask the accused whether he or she contests the issue. Even if evidence is excluded during the government’s case in chief, it can be introduced later during rebuttal if the accused disputes the issue during his or her case in chief.

It is interesting to note that Indiana abandoned the “depraved sexual instinct” exception and adopted Rule 404(b) at the same time Congress is considering a bill⁴² that would add three new rules to the Federal Rules of Evidence providing for the admissibility of evidence of similar crimes, even if not charged, in sex offense cases and in child molestation cases and evidence of similar acts in civil cases concerning sexual assault or child molestation.⁴³ Actual admissibility under any of the three proposed rules would be subject to a determination of unfair prejudice under Rule 403.⁴⁴ These proposed additions to the Federal Rules of Evidence obviously represent a dissatisfaction with the limits imposed by Rule 404(b) and a view that there is sufficient justification for treating sexual offenses different from other offenses. Of course, adoption of the proposed Federal Rules of Evidence 413, 414, and 415 will not require Indiana to adopt similar rules, even if the Indiana Supreme Court generally adopts the federal rules.

A week after its decision in *Lannan*, the Indiana Supreme Court again demonstrated its willingness to adopt a federal rule of evidence.

40. 487 N.E.2d 176, 179 (Ind. Ct. App. 1985). See also *Schumpert v. State*, 603 N.E.2d 1359, 1362 (Ind. Ct. App. 1992) (holding that because the identity of the robber was not so firmly established by two eyewitnesses as to make additional identification evidence—several prior, similar robberies—unnecessary, it was properly admitted under Rule 404(b)).

41. *Burch*, 487 N.E.2d at 179.

42. S. 3271 and H.R. 5960, 102d Cong., 2d Sess. § 121 (1992), referred to as the Sexual Assault Prevention Act of 1992.

43. The proposed Federal Rules of Evidence are (1) Rule 413 (Evidence of Similar Crimes in Sexual Assault Cases); (2) Rule 414 (Evidence of Similar Crimes in Child Molestation Cases); and (3) Rule 415 (Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation).

44. FED. R. EVID. 403.

*Nunn v. State*⁴⁵ involved the accused's attempt to use a conviction, for which a pardon had been granted, to impeach one of the state's witnesses.⁴⁶ Referring to it as an issue of first impression, the court decided to adopt Rule 609(c)⁴⁷ and held that the trial court correctly refused to permit the impeachment.⁴⁸ In relevant part, Rule 609(c) provides:

Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, . . . and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, . . . based on a finding of innocence.⁴⁹

The court determined that Rule 609(c) protects the purpose of a pardon—"to give a person a new start by blocking out the existence of guilt—[by] permitting impeachment by a pardoned conviction only in limited circumstances."⁵⁰ The state's witness in *Nunn* had lived a crime-free life after his release from probation and obtained a pardon in order to become a police officer.⁵¹

Application of the Indiana Rape Shield Statute⁵² in civil cases was addressed in *Barnes v. Barnes*.⁵³ In *Barnes*, the plaintiff sued her father for damages resulting from rape and sexual abuse when she was fifteen years old.⁵⁴ Relying on the Rape Shield Statute, the lower court excluded extensive evidence of prior sexual abuse of the plaintiff by persons other than her father.⁵⁵ At trial, the jury awarded the plaintiff compensatory damages of \$250,000 and punitive damages of \$3 million.⁵⁶ After concluding that the Rape Shield Statute does not apply in civil cases, the supreme court proceeded to address the relevancy of the prior sexual abuse.⁵⁷ The court concluded that the evidence was obviously relevant to issues presented in the case, including the plaintiff's claim that she

45. 601 N.E.2d 334, 337-38 (Ind. 1992).

46. *Id.* at 338.

47. *Id.*

48. *Id.*

49. FED. R. EVID. 609(c).

50. *Nunn*, 601 N.E.2d at 338.

51. *Id.*

52. IND. CODE § 35-37-4-4(a) (1988).

53. 603 N.E.2d 1337, 1342-45 (Ind. 1992).

54. *Id.* at 1337.

55. *Id.* at 1339.

56. *Id.*

57. *Id.* at 1342.

suffered post-traumatic stress disorder as a result of her father's attacks and the plaintiff's credibility in testifying against her father.⁵⁸ Because exclusion of the evidence was not harmless error, the judgment was reversed and the case remanded for a new trial.⁵⁹

There were other 1992 decisions in Indiana involving evidentiary issues, although they were of limited significance.⁶⁰ Consistent with *Lannan*, four recent cases of the Court of Appeals of Indiana adopted and applied FRE 404(b).⁶¹ Two cases of greater significance, were decided

58. *Id.* at 1343-44.

59. *Id.* at 1345. Another important issue in the case involved parental tort immunity. The court "conclude[d] that when, as here, a cause of action is predicated upon a claim of intentional felonious conduct and there is no issue of parental privilege, the doctrine of parental tort immunity will not apply to preclude the action." *Id.* at 1339-42.

60. See, e.g., *Barnes v. Barnes*, 603 N.E.2d 1337, 1346-47 (Ind. 1992) (holding that prior medical expense payments made by the defendant are not admissible under the collateral source statute; further, such payments constitute "advance payments" under IND. CODE § 34-3-2.5-1 (1988) and as such are not admissible as an admission of liability); *Pigg v. State*, 603 N.E.2d 154, 157 (Ind. 1992) (holding that the Sixth Amendment gives an accused the right to cross-examine a government informant concerning his address; however, the right is not absolute and, after an *in camera* hearing, the trial court might conclude the information should not be divulged if, for example, it is determined the witness would be in danger); *Sims v. State*, 601 N.E.2d 344, 346 (Ind. 1992) (holding that communication between the accused and his treatment center is privileged when the accused was ordered to attend and complete a treatment program as a term of probation in a prior case; admission of counselor's testimony amounted to self-incrimination in circumvention of the Fifth Amendment); *Chambers by Hamm v. Ludlow*, 598 N.E.2d 1111, 1117 (Ind. Ct. App. 1992) (holding that to qualify as an expert witness, the following elements must be established:

(1) the subject of the opinion or inference must be so distinctly related to some science, profession, business, or occupation as to be beyond the ken of laymen; and (2) the witness must have sufficient skill, knowledge, or experience in that field so as to make it appear that his opinion or inference will aid the trier of fact in his search for the truth.

Greathouse v. Armstrong, 601 N.E.2d 419, 425 (Ind. Ct. App. 1992) (holding that admission of evidence of other similar occurrences under substantially the same circumstances to prove the existence of a dangerous condition and notice thereof is left to the discretion of the trial court; remoteness and confusion are grounds for exclusion); *Liberty Nat'l Bank & Trust v. Payton*, 602 N.E.2d 530, 533 (Ind. Ct. App. 1992) (holding that authentication of an official record requires the custodian, by testimony or certification, to verify that the document is the original record or a true and accurate copy); *Sierp v. Vogel*, 592 N.E.2d 1253, 1254-55 (Ind. Ct. App. 1992) (holding that a leading question is "one which embodies a material fact and admits of a conclusive answer in the form of a simple 'yes' or 'no'"; question seeking a fact pertinent to a medical expert's practice was not a proper hypothetical question seeking an opinion and was therefore an improper leading question); *Spier by Spier v. City of Plymouth*, 593 N.E.2d 1255, 1259-60 (Ind. Ct. App. 1992) (deciding that a recorded statement of a deceased witness is hearsay and not admissible at trial unless it falls within an exception; therefore, a party resisting a motion for summary judgment cannot use the statement to create a factual dispute).

61. See *Moran v. State*, 604 N.E.2d 1258 (Ind. Ct. App. 1992); *Schumpert v.*

by the United States Supreme Court last term and are discussed below. Assuming Indiana adopts rules of evidence similar to the FRE, the federal courts' interpretation of the federal rules will provide guidance for the courts in Indiana.

Under the Federal Rules of Evidence, there are two categories of hearsay exceptions. One category is applicable only when the out-of-court declarant is unavailable at trial.⁶² Under the second category of hearsay exceptions the availability of the out-of-court declarant is immaterial.⁶³ Specifically, Rule 804(b)(1) creates an exception for the "former testimony" of an unavailable witness if the testimony was given under oath in another proceeding or in a deposition and "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."⁶⁴

In *United States v. Salerno*,⁶⁵ the United States Supreme Court addressed the application of Rule 804 in a situation where the defendants wanted to introduce the grand jury testimony of two witnesses who asserted their Fifth Amendment rights at trial.⁶⁶ Since the witnesses had invoked the Fifth Amendment privilege, they were considered unavailable at trial.⁶⁷ The critical issue in *Salerno* was whether the Government had a "similar motive" to develop, in this case impeach, the testimony of these two witnesses at the grand jury proceedings.⁶⁸ The grand jury testimony was excluded by the trial court, but the court of appeals reversed, holding that "adversarial fairness" requires elimination of the "similar motive" requirement when the government obtains immunized testimony in a grand jury proceeding from a witness who refuses to testify at trial.⁶⁹ Refusing to rewrite Rule 804(b)(1) by creating an exception, the Supreme Court held that the defendants must show that the government had a "similar motive" to develop the testimony during the grand jury proceedings. The Court remanded the case for a determination of this issue.⁷⁰

State, 603 N.E.2d 1359 (Ind. Ct. App. 1992); *Sink v. State*, 605 N.E.2d 270 (Ind. Ct. App. 1993); *Vanover v. State*, 605 N.E.2d 218 (Ind. Ct. App. 1992).

62. FED. R. EVID. 804.

63. FED. R. EVID. 803.

64. FED. R. EVID. 804(b)(1).

65. 112 S. Ct. 2503 (1992).

66. *Id.*

67. See FED. R. EVID. 804(a)(1).

68. *United States v. Salerno*, 112 S. Ct. 2503 (1992).

69. 937 F.2d 797, 806 (2d Cir. 1991), *rev'd*, 112 S. Ct. 2503 (1992).

70. *Salerno*, 112 S. Ct. at 2509-12. In his dissenting opinion, Justice Stevens argued that because these witnesses' testimony was critical to the government's case and because the prosecutors had to doubt their veracity before the grand jury, there was clearly a "similar motive" to develop their testimony at the grand jury proceedings. *Id.*

The *Salerno* decision demonstrates the Court's refusal to ignore the express language of the Federal Rules of Evidence. Another case, *White v. Illinois*,⁷¹ demonstrates the Court's tendency to find that Constitutional concerns—in *White* the Confrontation Clause of the Sixth Amendment—are reflected in the Federal Rules of Evidence. White was charged with sexually assaulting a four-year-old girl.⁷² Within an hour of the event, the victim reported the sexual assault to her babysitter, her mother, and a police officer.⁷³ Later, the victim made statements concerning the alleged assault while being examined by medical personnel.⁷⁴ At trial, the prosecutor did not call the victim to testify.⁷⁵ Instead, each of the persons to whom the victim reported the event was called to testify as to what the victim had said.⁷⁶ The hearsay problem was cured by the Illinois equivalent of Rule 803(2) on excited utterances, and Rule 803(4) regarding statements made for purposes of medical diagnosis or treatment.⁷⁷ Thus, only the Confrontation Clause issue was before the Court in *White*. The Court in *White* held that because these statements qualified for admission under "firmly rooted" hearsay exceptions, they were not barred by the Confrontation Clause, even though there was no showing that the out-of-court declarant was unavailable at trial.⁷⁸

Although the decision in *White* governs the Confrontation Clause of the Sixth Amendment of the United States Constitution, it does not control the interpretation of the Confrontation Clause in the Indiana Constitution.⁷⁹ In addressing a related issue in *Brady v. State*,⁸⁰ the Indiana Supreme Court held that the use of a four-year-old child's videotaped testimony in a sexual abuse case, without the child hearing or seeing the accused, violates the "face-to-face" provision of the Indiana Constitution, even though it would not violate the Sixth Amendment of the United States Constitution, as interpreted by the United States Supreme Court in similar cases.⁸¹

In 1994, Indiana will join the majority of states (over thirty) that have adopted some version of the Federal Rules of Evidence or the very similar Uniform Rules of Evidence. While this will undoubtedly bring

71. 112 S. Ct. 736 (1992).

72. *Id.* at 739.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. FED. R. EVID. 803(2) and (4).

78. *White*, 112 S. Ct. at 741-42.

79. IND. CONST. art. I, § 13.

80. 575 N.E.2d 981 (Ind. 1991).

81. See *Maryland v. Craig*, 497 U.S. 836 (1990); *Coy v. Iowa*, 487 U.S. 1012 (1988).

some reform to the law of evidence in Indiana, even more importantly, the adoption of rules of evidence will facilitate access to the law. Furthermore, assuming Indiana adopts rules similar to the Federal Rules of Evidence, it will be easier for Indiana trial attorneys to move between the state courts and the federal courts.

The Progression of Indiana's Family Law in 1992

MICHAEL G. RUPPERT*

NANCY L. CROSS**

INTRODUCTION

During the Survey period, the Indiana appellate courts issued more than seventy-five reported decisions in the traditional "family law" areas of marriage dissolutions, property distribution, custody, visitation, paternity, adoption, and support. The bulk of the decisions applied established precedent to typical issues with expected results. As in the recent past, however, the appellate courts did not shy away from making progressive and sometimes controversial rulings on prominent issues of social concern in areas such as family torts and the rights and obligations of noncustodial parents.

I. PROPERTY DISTRIBUTION

A. Statutory Determination and Distribution of Property

Property distribution necessarily involves questions concerning the definition, division, and worth of specific marital property. In 1992, the trial courts and the appellate courts continued to struggle with the questions of what constitutes "property," whether property may be excluded from the marital estate, what justifies a deviation from a 50/50 distribution, and the necessity of presenting evidence as to valuation.

In *Prenatt v. Stevens*,¹ the Court of Appeals for the Fourth District addressed a wife's appeal of a lower court decision which held that a doctoral degree earned by the wife during the course of the parties' marriage was a "marital asset."² In *Prenatt*, the trial court concluded that because the wife's doctoral degree resulted in her enhanced earning capabilities, it was considered properly as a marital asset. Without placing a specific value on the degree, the court determined that it was appropriate to set off a pension of \$200,000 to the husband inasmuch as the wife was receiving the "value" of her degree.³

* Of Counsel, Miroff, Cross, Ruppert & Klineman. B.A., 1974, Indiana University; J.D., 1977, Cleveland-Marshall College of Law.

** Partner, Miroff, Cross, Ruppert & Klineman. B.S., 1976, Western Michigan University; J.D., 1979, University of Nebraska College of Law.

1. 598 N.E.2d 616 (Ind. Ct. App. 1992).

2. *Id.* at 619-21.

3. *Id.* at 619.

Expressing skepticism that an educational degree is capable of valuation, the court of appeals reasoned that any such valuation would result in an award of property beyond the actual physical assets of the marriage.⁴ Citing *Wilcox v. Wilcox*⁵ and *In Re Marriage of McManama*,⁶ the court concluded that such an award would constitute an impermissible form of maintenance or support. The court stated that:

[a] degree is an intangible which is personal to the holder. It is a piece of paper and has no real value except for what the holder chooses to pursue with it. Potential worth is dependent upon choice and availability of work, whether the holder is good at what she does, or a myriad of other potentialities.⁷

The court held that an advanced degree does not constitute a vested property interest and, therefore, does not constitute marital property.⁸

Judge Chezem, in her concurring opinion, disagreed that advanced degrees are not marital property.⁹ Judge Chezem declined to elaborate on her reasoning. Nevertheless, her concurrence provides an intriguing invitation for a practitioner to pursue in this area.

Expressing a radical departure from the traditional "one pot" theory of property, the court of appeals in *Lulay v. Lulay*¹⁰ concluded that a husband's military pension was not a marital asset inasmuch as it had been earned prior to the parties' marriage.¹¹ Five months later, apparently recognizing the error in its conclusion, the court of appeals entered a second opinion in *Lulay*,¹² reversing its prior rationale.¹³ In *Lulay II*, the court noted that its prior exclusion of the husband's pension from the marital pot had been erroneous.¹⁴ The appellate court concluded that although the effect of the erroneous exclusion of the pension had resulted in an unequal property division, the distribution was justified by the trial court's finding that the wife had made no contribution toward the acquisition of the pension.¹⁵

A concise explanation and reaffirmation of the "one pot" theory of marital property, which pulls into the marital estate virtually all

4. *Id.* at 620.

5. 365 N.E.2d 792 (Ind. Ct. App. 1977).

6. 399 N.E.2d 371 (Ind. 1980).

7. Prenatt, 598 N.E.2d at 620.

8. *Id.*

9. *Id.* at 622.

10. 583 N.E.2d 171 (Ind. Ct. App. 1991) [hereinafter *Lulay I*].

11. *Id.* at 174.

12. 591 N.E.2d 154 (Ind. Ct. App. 1992) [hereinafter *Lulay II*].

13. *Id.* at 155-56.

14. *Id.* at 155.

15. See also *In re Davidson*, 540 N.E.2d 641, 646 (Ind. Ct. App. 1989).

recognizable property interests not excluded by a valid antenuptial agreement is found in *Huber v. Huber*.¹⁶ *Huber*'s citation of *Lulay I* as authority to uphold a trial court's setting aside to one spouse the value of his or her pension funds on the basis that the funds had not been acquired through the joint efforts of both spouses is unfortunate.¹⁷ Although decided prior to *Lulay II*, *Huber* does not point out the contradictory holding in *Lulay I*—the exclusion in *Lulay I* of an obvious marital asset from the marital estate prior to distribution, as opposed to *Huber*'s correct analysis which requires inclusion of the asset. *Huber* and *Lulay II* recognize that the same result as in *Lulay I* may be accomplished by an unequal property division based upon evidence that an equal division of the value of a particular asset may be unreasonable based on the factors found under Indiana Code section 31-1-11.5-11(c).¹⁸

Although the Fifth District Court of Appeals attempted to expand the concept of "property" to include a former air traffic controller's federal workers' compensation benefits in *Leisure v. Leisure*,¹⁹ the Indiana Supreme Court concluded that such benefits were not marital property as defined in section 31-1-11.5-2(d) of the Indiana Code.²⁰ The court rejected the court of appeals reliance on *Gnerlich v. Gnerlich*²¹ for the proposition that the federal workers' compensation benefits were analogous to the disability insurance benefits addressed in *Gnerlich*. The court distinguished the two types of benefits on the basis that unlike the pension in *Gnerlich*, the husband had not been required to pay a monthly premium or in any way deplete marital assets to acquire the federal workers' compensation benefits.²²

The court also distinguished the workers' compensation benefits from common law tort claim awards because of the absence of damages for pain and suffering or monetary loss in workers' compensation benefits;²³ workers' compensation benefits are limited to wages lost as a result of an individual's inability to continue working.²⁴ Pension benefits are also distinguishable from workers' compensation benefits in that unlike the deferred compensation from a pension, workers' compensation benefits represent future wages.²⁵ The court further noted that workers' com-

16. 586 N.E.2d 887 (Ind. Ct. App. 1992).

17. *Id.* at 889.

18. *Id.*

19. 589 N.E.2d 1163 (Ind. Ct. App. 1992).

20. *Leisure v. Leisure*, 605 N.E.2d 755, 759 (Ind. 1993).

21. 538 N.E.2d 285 (Ind. Ct. App. 1989).

22. *Leisure*, 605 N.E.2d at 758.

23. *Id.*

24. *Id.*

25. *Id.*

pensation benefits were contingent upon the employee's continued disability.²⁶ On this basis, the court determined that workers' compensation benefits are not vested property under Indiana law.²⁷

*Livingston v. Livingston*²⁸ highlighted the importance of presenting evidence as to the value of marital property. The Court of Appeals for the Third District affirmed the trial court's exclusion of a husband's 401K retirement plan from the marital pot because neither party had offered proof as to whether the plan was vested, or as to its value, despite the husband's testimony that he would receive a distribution from the account if his employment was terminated.²⁹ Citing *Grammar v. Grammar*,³⁰ the court held that it was not error to exclude the 401K plan from marital assets where the evidence did not establish unequivocally that the plan was vested or had a present value.³¹ Additionally, although the court noted that the property division imposed by the trial court "appears somewhat unequal," the absence of evidence in the record as to the value of property contained in the marital estate led to the presumption that the trial court had considered all evidence and had properly applied the statute in dividing the property.³²

Seemingly in conflict with *Livingston* was the case of *Schueneman v. Schueneman*.³³ In *Schueneman*, the Fourth Circuit Court of Appeals noted that although no substantive evidence had been presented as to the value of a wife's pension, "it is likely that the plan has some value and, by awarding it to [the wife], the trial court made an unequal distribution of the marital estate without making findings why a deviation from a 50/50 split was just and reasonable."³⁴ Remanding the issue for further consideration, the court of appeals noted that inasmuch as neither party had presented evidence as to the plan's value, division of the plan by the trial court based upon a present value would be speculative: "However, as an alternative, the Court may order a percentage of [the wife's] future payments be paid to [her husband]."³⁵

Unlike *Livingston*, the court was not willing to affirm the trial court based on a presumption that it had considered all evidence and properly applied the statute.³⁶ Although a distinction arguably exists between

26. *Id.* at 758-59.

27. *Id.* at 759.

28. 583 N.E.2d 1225 (Ind. Ct. App. 1992).

29. *Id.* at 1228.

30. 566 N.E.2d 1080, 1083 (Ind. Ct. App. 1991).

31. *Livingston*, 583 N.E.2d at 1228.

32. *Id.* See also *Porter v. Porter*, 526 N.E.2d 219, 222 (Ind. Ct. App. 1988).

33. 591 N.E.2d 603 (Ind. Ct. App. 1992).

34. *Id.* at 609.

35. *Id.*

36. *Id.*

Livingston and *Schueneman* in that the court in *Livingston* found no evidence that the 401K plan was vested, this glosses over the husband's testimony in *Livingston* that he would be able to cash-out the plan if he was terminated from work.

The Third District Court of Appeals in *Nil v. Nil*³⁷ concluded that the trial court erred when it found that the parties' personal property was functionally equivalent in value. The Third District held that the trial court had ignored clear evidence that the fair market value of the personal property distributed to each spouse differed greatly.³⁸ The actual distributions were unequal and conflicted with the language of the decree, which purportedly divided the marital estate 50/50. Accordingly, the trial court was directed to adjust the cash distribution in its property division consistent with the actual values of the personal property being divided.³⁹

Of greater interest in *Nil*, however, was the court of appeals' affirmation of the trial court's inclusion (as a marital asset) of the parties' federal joint tax refund.⁴⁰ Although the husband was the sole wage earner and the dissolution petition had been filed in April 1989, the court refused to exclude part of the refund attributable to the percentage of income earned by the husband after the filing of the petition.⁴¹ The court justified inclusion of the entire refund in the "marital pot" by reasoning that because the husband had deposited the refund into a joint account, each party was responsible for discharging financial obligations of the family; thus, the refund would not have been as substantial if the parties elected to file separately.⁴² The practitioner should take note of *Nil* when advising his client as to whether to file a joint income tax return with his spouse.

Addressing the issue of fraud, the Indiana Supreme Court in *Selke v. Selke*⁴³ reversed the court of appeals, finding that where a husband and wife had entered into a property settlement agreement without having exchanged information as to the value of husband's pension plan, the settlement would not be set aside for fraud.⁴⁴ Refusing to expand the application of *Atkins v. Atkins*,⁴⁵ the supreme court found that there was no absolute duty to disclose an asset's value. Limiting *Atkins* to its facts, the court stated:

37. 584 N.E.2d 602 (Ind. Ct. App. 1992).

38. *Id.* at 604.

39. *Id.*

40. *Id.* at 604-05.

41. *Id.* at 606.

42. *Id.*

43. 600 N.E.2d 100 (Ind. 1992).

44. *Id.* at 101-02.

45. 534 N.E.2d 760 (Ind. Ct. App. 1989).

While a duty to disclose asset value information may arise from unique factual circumstances including the express terms of a property settlement agreement, or from a request for discovery under the Indiana Trial Rules, such a duty of spontaneous disclosure is not imposed as a matter of law by Indiana Code Sections 31-1-11.5-11(b) and -11(c) of the Indiana Dissolution of Marriage Act. Clearly there is no express statutory duty of mandatory disclosure. Nor can such a duty reasonably be inferred from the Act.⁴⁶

Further expanding the concept of what is to be included in the "marital pot," the Third District Court of Appeals determined in *Hughes v. Hughes*⁴⁷ that a husband's early retirement supplement was "marital property," subject to division upon dissolution, even though it would only have value if the husband elected to retire prior to age sixty-two. Though acknowledging that a husband would receive no benefit under the early retirement supplement unless he terminated his employment prior to age sixty-two, the court construed broadly a statutory definition of "property," reasoning that inasmuch as the pension supplement was available at the time of dissolution and was not forfeited upon termination of employment, it constituted property as defined in section 31-1-11.5-2(d)(2) of the Indiana Code: "The statutory definition of property is broad and inclusive, 'providing that "all" assets "including" various pension interests are to be considered marital property subject to division.'"'⁴⁸

To the extent that the early retirement supplement was "available" to the parties at the time of the dissolution proceedings, the court of appeals was not persuaded that possible future forfeiture as a result of the husband's unilateral actions would justify its exclusion from the marital estate. The court seemed to suggest that inasmuch as the decision either to retire early or forfeit the supplement was within the husband's sole control, the husband retained control over whether he would be penalized by inclusion of the supplement in the marital estate.

B. Prenuptial Agreements: An Alternative to Statutory Property Distribution

The expansive definition of marital property contained in section 31-1-11.5-2(d) of the Indiana Code requires the trial court to distribute

46. *Selke*, 600 N.E.2d at 101-02.

47. 601 N.E.2d 381 (Ind. Ct. App. 1992) *trans. denied*.

48. *Id.* at 383 (citation omitted). See also *Huber v. Huber*, 586 N.E.2d 887, 889 (Ind. Ct. App. 1992). *Hughes* may turn on the special weight of its facts, however, inasmuch as the trial court had been presented with stipulated evidence as to the *value* of the supplement. If the husband had argued that the supplement was incapable of valuation given its speculative nature, the result might have been different.

virtually all ascertainable property of both parties unless distribution is controlled by a valid antenuptial agreement. Although the Indiana courts have taken a broadening view as to the enforceability of antenuptial agreements, there continues to be a small, albeit ever-restricting, window through which these agreements can be rejected.

Narrowing that window, the court of appeals in *Matuga v. Matuga*⁴⁹ overturned the trial court's rejection of a prenuptial agreement. In *Matuga*, the parties executed a prenuptial agreement one day prior to their wedding. The husband, an attorney, had drafted the agreement and the wife, a legal secretary, had not been represented by counsel. Although the parties had discussed the agreement and their relative assets prior to execution, the wife was never provided with an inventory of the husband's assets until the time that she was presented with the finalized document for signature. She was allowed only a brief review of the document and was not provided with a copy of it following execution.

Over a strong dissent by Justice Staton, the majority decided that the trial court erred in concluding that, "[t]he burden of proof that the antenuptial [a]greement was fairly entered into, with [the wife's] full knowledge of the extent of the property owned by [the husband], rests upon [the husband], a burden he has failed to discharge."⁵⁰ Noting that the burden of proof generally lies with the person petitioning to invalidate an antenuptial contract, the court stated the following exception:

[When], however, the other party has a degree of dominance, that party may be required to demonstrate that the agreement is valid, but only if the dominance and its employment has vitiated the free will of the party challenging the agreement and even then, only if the party defending the agreement has obtained a substantial and unconscionable advantage.⁵¹

The court appeared to reweigh the evidence by rejecting the conclusions drawn by the trial court as to the husband's position of dominance, the time pressures placed upon the wife, the impact of the husband's failure to disclose the value of certain assets, and the wife's lack of representation by counsel.⁵² Placing an emphasis on the fact that by virtue of the wife's employment as a legal secretary she should have known the legal effect of the document she was signing, the court

49. 600 N.E.2d 138 (Ind. Ct. App. 1992).

50. *Id.* at 141.

51. *Id.* (citing *In re Palamara*, 513 N.E.2d 1223, 1230 (Ind. Ct. App. 1987); *Johnston v. Johnston*, 184 N.E.2d 651 (Ind. Ct. App. 1962)).

52. *Id.*

reversed the trial court's judgment.⁵³ Judge Staton issued a strong dissent, reasoning that the majority opinion had sanctioned fraud by completely ignoring the trial court's factual findings and instead reweighing the evidence before it.⁵⁴

The court of appeals in *Justus v. Justus*⁵⁵ reversed the trial court's invalidation of the parties' prenuptial agreement. In *Justus*, the trial court found that an antenuptial agreement was unenforceable based upon circumstances at the time of the dissolution, rather than upon circumstances at the time of execution of the agreement. During the parties' marriage, the husband had a net worth in excess of \$31 million and had agreed by the terms of the antenuptial agreement to pay his wife a fixed sum of money based upon the duration of the marriage.⁵⁶ At the time of trial, the husband had suffered a drastic financial reversal which had left his net worth at approximately \$500,000. Inasmuch as enforcement of the agreement would have resulted in the wife being awarded almost the *entire* marital estate, the trial court found that it would be unconscionable to enforce the terms of the antenuptial agreement, and applied section 31-1-11.5-11 of the Indiana Code to award the wife sixty-six percent of the marital estate.

On appeal, the wife asserted that the trial court was precluded from examining changes in circumstances after execution of the prenuptial agreement in determining whether or not the agreement was enforceable. While agreeing that the doctrine of unconscionability traditionally applies only to the time of execution, the court found that, "in certain factual situations . . . a trial court may refuse to enforce an antenuptial agreement due to circumstances existing at the time of dissolution."⁵⁷

The court of appeals reasoned that there was no basis to distinguish between provisions for property division and spousal maintenance in assessing the trial court's ability to examine the circumstances existing at the time of dissolution in deciding the validity of a prenuptial agreement: "If an antenuptial agreement dividing property between the parties would leave a post-dissolution reality in which one spouse would not have sufficient property to provide for his reasonable needs, then the court may refuse to enforce the antenuptial agreement."⁵⁸ Inasmuch as the trial court had not made specific findings regarding the husband's ability to support himself if the agreement were enforced, the judgment

53. *Id.* at 141-42.

54. *Id.* at 142 (Staton, J., dissenting).

55. 581 N.E.2d 1265 (Ind. Ct. App. 1991).

56. The agreement provided that the wife would receive \$500,000 after five years of marriage.

57. *Justus*, 581 N.E.2d 1265 at 1272.

58. *Id.* at 1274.

was determined to be clearly erroneous and the case was remanded: "We emphasize that the standard is stringent and the hardship contemplated must rise above a drastic alteration in [the] Husband's accustomed standard of living to threaten Husband's very ability to provide for himself."⁵⁹

II. CHILDREN

A. Custody

1. *Postdissolution and Postpaternity Custody Modifications Involving Different Statutory Standards.*—The conflict between the Indiana Courts of Appeals—noted in a prior survey of developments in family law⁶⁰—concerning the standards to be used in postdissolution and post-paternity custody modifications has been resolved. In *In re Grissom*,⁶¹ the father's paternity of the parties' daughter was established in 1988, and by agreement, the mother was awarded custody with visitation privileges granted to the father. The father was later successful in obtaining modification of the custody agreement due to the mother's several out-of-state moves in violation of his visitation rights. The trial court's special findings centered on the home environments available to the mother and father for the care of their daughter and concluded "that in the best interest of [the parties' daughter], custody should be placed with [the] father and that [the] mother should have visitation."⁶² The trial court's conclusion was consistent with the standard for modification of custody in paternity actions found in section 31-6-6.1-11(e) of the Indiana Code: "The court may modify an order determining custody rights whenever modification would serve the best interests of the child."⁶³

The "best interests" standard is profoundly different from the "substantially changed circumstances" standard employed in post-dissolution custody modification proceedings found in section 31-1-11.5-22(d) of the Indiana Code, which requires, "changed circumstances so substantial and continuing as to make the existing custody order unreasonable."⁶⁴ In the court of appeals, Chief Judge Ratliff noted that the best interests

59. *Id.* at 1275.

60. Michael G. Ruppert & Monty K. Woolsey, *The Continuing Evolution of Indiana's Family Law in 1991*, 25 IND. L. REV. 1243 (1992).

61. 587 N.E.2d 114 (Ind. 1992), *rev'g In re Grissom*, 573 N.E.2d 440 (Ind. Ct. App. 1991).

62. 587 N.E.2d at 115.

63. IND. CODE § 31-6-6.1-11(e) (1988).

64. *Id.* § 31-1-11.5-22(d) (1988).

standard for modification was first reviewed with some concern for its constitutionality in *Griffith v. Webb*⁶⁵—which adhered to the best interest standard—and, then in *Walker v. Chatfield*,⁶⁶ a Fourth District decision that employed the substantial and continuing change of circumstances standard. Finding no policy reason to employ the best interests standard, and agreeing with *Griffith* that constitutional concerns were involved, the court of appeals reversed the trial court and returned custody to the mother.⁶⁷

The Indiana Supreme Court granted transfer to resolve the conflict. The court first noted that the courts do not interpret statutes which are clear and unambiguous on their face; thus, the paternity statute must be given its apparent or obvious meaning.⁶⁸ Brushing aside the concerns over potential constitutional problems, the supreme court observed that a cogent argument had not been presented on the issue and that no constitutional problem existed with the statute as it applied to the case.⁶⁹ Thus, the court held “that on matters relating to change of custody in paternity actions, the standard to be applied is whether the modification would serve the best interests of the child.”⁷⁰

The practical effect of different standards in post-paternity and post-dissolution custody modifications is considerable. The deterrent to seeking modification brought about by the substantial and continuous change of circumstances standard is well-known to litigators. Although this standard is not available to custodial parents to maintain the stability of the parent/child relationship after paternity has been established, the availability of the less burdensome best interests standard to non-custodial parents will permit them to wrestle custody away more easily from an inadequate custodial parent whose situation has not changed since the entry of the initial custody order. In short, whether one views the supreme court’s decision in *Grissom* as desirable depends upon whether one believes the best interests of a child are better preserved through stability of the child’s environment—even if marginal—or by placement of the child in an optimal environment.

2. *What Happens to Children upon the Death of the Custodial Parent?*.—The Fourth District observed in *Atteberry v. Atteberry*⁷¹ that long-standing Indiana law forces the trial court which originally decided dissolution and custody issues to lose jurisdiction over custody of the

65. 464 N.E.2d 384 (Ind. Ct. App. 1984).

66. 553 N.E.2d 490 (Ind. Ct. App. 1990).

67. *In re Grissom*, 573 N.E.2d 440, 443 (Ind. Ct. App. 1991).

68. *In re Grissom*, 587 N.E.2d 114, 116 (Ind. 1992).

69. *Id.*

70. *Id.*

71. 597 N.E.2d 355 (Ind. Ct. App. 1992).

children upon the death of the custodial parent.⁷² Thus, the court found that the deceased custodial mother's sister and brother-in-law could not intervene in the dissolution action for purposes of petitioning for modification of the dissolution decree in order to gain custody of the decedent's child. Instead, custody of the child automatically inured to the surviving parent, unless the surviving parent's visitation privileges were suspended or supervised at the time of the custodial parent's death.⁷³

3. *Can Visitation Be Restricted upon Suspicion of the Noncustodial Parent's Homosexuality?*.—Eleven years after deciding that homosexuality does not as a matter of law render the homosexual parent unfit to have custody of a child in the absence of evidence of an adverse effect upon the child,⁷⁴ the court of appeals in *Pennington v. Pennington*⁷⁵ essentially upheld a trial court's finding that the alleged homosexuality of the noncustodial parent can be the basis for restricting overnight visitation to times when the father's adult male friend is not present in the household. In *Pennington*, the parties agreed that the mother should

72. *Id.* at 356.

73. *Id.* Under Indiana Code § 31-1-11.5-27 (Supp. 1992), the trial court in a dissolution action "shall enter a conditional order naming a temporary custodian for the child" to receive temporary custody of the child upon the custodian's death where the court has previously required supervision during the noncustodial parent's visitation, or has suspended the noncustodial parent's visitation. The temporary custodian may then petition for his or her continued appointment as temporary guardian under Indiana Code § 29-3-3-6 (Supp. 1992) and/or as a permanent guardian under Indiana Code § 29-3-5-1 (1988 & Supp. 1992). Of course, Indiana Code §§ 31-1-11.5-27 and §§ 29-3-3-6 contemplate a situation in which the surviving non-custodial parent has had visitation privileges restricted. Other third parties seeking custody where visitation has not been suspended or restricted at the time of the custodian's death would seek custody under Indiana Code § 29-3-5-1 in a proceeding for the appointment of a guardian over the minor.

Although neither Indiana Code §§ 29-3-3-6 nor §§ 31-1-11.5-27 states the standard for a permanent award of custody, i.e. the best interests of the child, it probably may be presumed. However, in the latter situation where visitation has not been restricted, the third party would be required to overcome the presumption that placement of the child with the surviving parent is in the child's best interest as discussed in the line of cases starting with *Hendrickson v. Binkley*, 316 N.E.2d 376 (Ind. Ct. App. 1974), *cert. denied*, 423 U.S. 868 (1975), and more recently discussed in *Turpen v. Turpen*, 537 N.E.2d 537 (Ind. Ct. App. 1989). See *In re Guardianship of Riley*, 597 N.E.2d 995 (Ind. Ct. App. 1992) (grandparent's petition for guardianship of child upon death of custodial parent denied where father exercised unrestricted visitation rights and was not alleged to have been unfit or to have abandoned child). Obviously, the grandparent in *In re Guardianship of Riley* could seek grandparent visitation privileges under Indiana Code § 31-1-11.7-1 (1988). See also *In re Groleau*, 585 N.E.2d 726 (Ind. Ct. App. 1992) (adoption of child by stepparent did not terminate paternal grandmother's visitation rights, even though father had agreed to terminate his parental rights, where grandmother acted to perfect her visitation rights prior to termination of her son's parental rights).

74. *D.H. v. J.H.*, 418 N.E.2d 286 (Ind. Ct. App. 1981).

75. 596 N.E.2d 305 (Ind. Ct. App. 1992).

have custody and that the father would enjoy reasonable visitation and pay child support. However, at the wife's request, the trial court permitted overnight visitation between the father and his son only when the father's male roommate was not present. The court's ruling was based upon the wife's suspicion that the father was homosexual because of a Valentine's Day card given to the father by his male roommate. The mother admitted that she had never witnessed any homosexual activity between the father and his male roommate, and could not say with certainty that the father was homosexual. The father denied that his relationship with his roommate was homosexual.⁷⁶

Declining to reweigh evidence or to reassess the credibility of the witnesses, the court of appeals found that the trial court's decision was not an abuse of discretion: "It is not puritanical or unreasonable to attempt to shield a child of tender age . . . from the sexual practices of the visiting parent, whether those practices are homosexual . . . or heterosexual."⁷⁷ Citing a number of cases from other jurisdictions upholding prohibitions against visitation by non-custodial parents who lived with adults of the opposite sex, the court went on to say:

Although the circumstances giving rise to these cases vary widely, the cases all stand for the proposition that the best interests of the child often demand the child be shielded from the visiting parents' heterosexual practices. There are an equal number of cases upholding trial courts' visitation restrictions when the partner is homosexual, as well.⁷⁸

In a dissenting opinion, Judge Robertson wrote that he had no disagreement with the rationale expressed in the majority opinion, but stated his belief that the evidentiary basis for the decision to restrict visitation did not meet the showing of endangerment to the child's physical health or impairment of his emotional development required under section 31-11.5-24 (a) and (b) of the Indiana Code.⁷⁹

4. *What Standard Should Be Used When Modifying Joint Custody?*—In *Lamb v. Wenning*,⁸⁰ the Indiana Supreme Court agreed with the court of appeals⁸¹ that in an action to modify joint custody where one parent has primary physical custody, the substantial changed circumstances standard should be used instead of the best interests standard. However, the supreme court disagreed with the appellate court's ruling

76. *Id.* at 306.

77. *Id.*

78. *Id.* at 306-07.

79. *Id.* at 307 (Robertson, J., dissenting).

80. 600 N.E.2d 96 (Ind. 1992).

81. *Lamb v. Wenning*, 583 N.E.2d 745 (Ind. Ct. App. 1991).

that the mother's out-of-state relocation was insufficient as a matter of law to warrant modifying custody, and thus remanded the case to the trial court for evaluation of the evidence under the changed circumstance standard.⁸²

B. Child Support

Widespread anticipation that the amendment of the Indiana Child Support Rules and Guidelines⁸³ will spawn considerable litigation concerning their application and interpretation remains today as in recent periods. In 1992, decisions supplied guidance for the application of the Guidelines in less typical situations.⁸⁴

The court of appeals in *Terpstra v. Terpstra*⁸⁵ noted that "[t]he Indiana Child Support Guidelines do not confront the problem of establishing a support order in shared or joint custody situations. This is left to the trial court's discretion for handling on a case by case basis."⁸⁶ In *Terpstra*, the parties agreed to modify the part of their divorce decree pertaining to custody and visitation by implementing a shared custody arrangement whereby the father would have the children fifty percent of the time. The parties were unable to agree to the appropriate amount of support under the circumstances and submitted the issue to the trial court. The trial court found that the father's child support obligation under the Guidelines was approximately \$200 per week, and reduced support to approximately \$100 per week, citing the equal time sharing arrangement as the reason for its deviation from the Guidelines.⁸⁷

Among the mother's contentions on appeal was that the length of time of possession should have been an irrelevant consideration unless tied to substantial evidence of actual changes in expenditures caused by the shared custody. The court responded to this contention in what is becoming a familiar refrain: trial courts must avoid the pitfall of blind

82. *Lamb*, 600 N.E.2d at 98-99.

83. The Indiana Supreme Court's amendment of the court's previously adopted mandatory Indiana Child Support Rules and Guidelines was based upon the recommendations of the Judicial Administration Committee of the Judicial Conference of Indiana and the Indiana Child Support Advisory Committee pursuant to § 33-2.1-10-1 of the Indiana Code.

84. The much-anticipated amendment to the Indiana Child Support Rules and Guidelines, effective Mar. 1, 1993, likely places in question the authority of some of the decisions issued during the survey period. The amendments, not issued until January 7, 1993, came after the survey period; the extensive changes are beyond the scope of a general survey such as this and merit individual attention.

85. 588 N.E.2d 592 (Ind. Ct. App. 1992).

86. *Id.* at 596.

87. *Id.* at 594.

adherence to the Guidelines;⁸⁸ and although a deviation from the guidelines requires the trial court to articulate a sufficient basis for the deviation in a written finding of the factual circumstances supporting the conclusion,⁸⁹ the finding need not be especially formal as long as the reviewing court can discern the basis for deviation.⁹⁰ The court noted that the first child support Guideline states as one of the situations to be considered appropriate for a deviation from the Guideline amount is a situation where "[t]he children spend substantially more time with the noncustodial parent than the average case."⁹¹ Noting that the commentary to the Guidelines explains that the failure of the guidelines to address child support in shared custody situations is based upon the infinite permutations in shared custody for time spent with each parent, travel between parents, *et cetera*, the court observed that the father assumed, without court order, educational expenses that the mother had been ordered to pay, was responsible for all transportation of the children between households, and paid other day-to-day expenses.⁹² Under these circumstances, the court refused to find an abuse of discretion.⁹³

The primary issue in *Poynter v. Poynter*⁹⁴ involved the application of social security disability benefits received by a child on behalf of a disabled parent in the computation for child support, where the disabled parent was the support recipient. In prior appeals involving social security disability benefits, the trial courts had applied benefits for the children as support payments on behalf of the disabled parent who was the child support obligor.⁹⁵ Thus, the issue in *Poynter* had not been addressed previously by an Indiana court.

In *Poynter*, the trial court determined that the total support obligation was two hundred dollars per week. The court reduced the total support obligation by the \$61.86 in benefits that the children received on behalf

88. *Id.* at 594-95. Under the third stated objective of the Indiana Child Support Guidelines, the court emphasizes that the Guidelines are not "immutable, black letter law." The court advises further that, "[a] strict and totally inflexible application of the Guidelines to all cases can easily lead to harsh and unreasonable results."

89. Support Rule 3 states that "[i]f the court concludes from the evidence in a particular case that the amount of the award reached through application of the guidelines would be unjust, the court shall enter a written finding articulating the factual circumstances, supporting that conclusion."

90. *Terpstra*, 588 N.E.2d at 596.

91. *Id.* (quoting Indiana Child Support Guideline 1).

92. *Id.* at 596-97 (quoting Additional Commentary, Indiana Child Support Guidelines).

93. *Id.* at 597.

94. 590 N.E.2d 150 (Ind. Ct. App. 1992).

95. See *Dorgan v. Dorgan*, 571 N.E.2d 325 (Ind. Ct. App. 1991); *Ritter v. Bartholomew Co. Dep't. of Pub. Welfare*, 564 N.E.2d 329 (Ind. Ct. App. 1990); and *Patrick v. Patrick*, 517 N.E.2d 1234 (Ind. Ct. App. 1988).

of their disabled mother, the support recipient. Finally, the court computed the father's proportionate support obligation on the total obligation reduced by the children's benefits.⁹⁶

On appeal, the mother argued that the children received the benefits because of her disability, and that the benefits amounted to support furnished by her; thus, the court should have allocated the father's proportionate obligation to the total support obligation. The different methods of calculation amounted to more than a fifty dollar per week difference in the father's support obligation.⁹⁷ The court stated that, "[f]ollowing the majority rule of other jurisdictions, we hold that the disabled parent is entitled to have child support obligations credited with the social security disability benefits received by the child because of that parent's disability."⁹⁸ Thus, the court of appeals found that the trial court erred by reducing the total support obligation before determining the share of each party.

In *Carr v. Carr*,⁹⁹ the Indiana Supreme Court decided that "an order for college expenses which allocates the expenses between the parents in a way disproportionate to their resources is clearly erroneous."¹⁰⁰ In *Carr*, the mother initiated an action against her ex-husband to require that he assume the educational expenses of their daughter.¹⁰¹ The trial court found that substantial and continuing changes in circumstances had occurred, and that the child had the aptitude and ability for a college education. Furthermore, the court found that the parties could reasonably finance such an education.¹⁰² The court's order required the father to pay all tuition, room and board, fees, books, and supplies at a state-supported school.¹⁰³ The mother was to pay remaining miscellaneous college expenses, and the sum paid by the father was to be reduced by any nonrepayable grants, scholarships or other benefits awarded to the child.¹⁰⁴ The order also provided for abatement of support while the child attended college full-time, and reduction for support during vacation periods because of the likelihood that the child would have employment during the summer months.¹⁰⁵ The father appealed, but the court of appeals affirmed.¹⁰⁶

96. *Poynter*, 590 N.E.2d at 152.

97. *Id.*

98. *Id.*

99. 600 N.E.2d 943 (Ind. 1992).

100. *Id.* at 944.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Carr v. Carr*, 580 N.E.2d 966 (Ind. Ct. App. 1991).

On transfer to the Indiana Supreme Court, the sole issue was whether the trial court's apportionment of college expenses was erroneous.¹⁰⁷ Testimony revealed that the father earned approximately sixty percent of the parties' combined gross incomes.¹⁰⁸ Although both parties owned property and had modest savings, the father's assets were clearly greater. In a thoughtful analysis designed to bring some clarity to the gray area of college expenses, the supreme court noted that the Indiana Child Support Guidelines merely amplified upon the provisions of section 31-11.5-12(b)(1) of the Indiana Code, which provides that a divorce court may require payment of the expenses of higher education.¹⁰⁹ In *Carr*, the statute required a review of the aptitude and ability of the child, and the means of the parties in order to assure the standard of living the child would have enjoyed had the marriage not been dissolved. The court noted with approval lower court decisions holding that the Guidelines are to be utilized in the resolution of all support matters, including extraordinary educational expenses.¹¹⁰ In particular, the court noted the commentary to Guideline (3)(E), which requires judges to consider all sources of financial assistance for a higher education, including loans.¹¹¹ Further, the commentary provides that the court should consider a failure by the student to apply for all available aid when making its order concerning higher education expenses.¹¹²

The court then reached the central part of its holding, which proportioned the expenses of the child's higher education. Though a trial court has discretion pursuant to Guideline 3(E)(3) to include extraordinary educational expenses in its calculation of support, or to order them separately and distinctly from child support, if the court chooses the latter method, it must adhere to that proportionality.¹¹³ Thus, even though the father had more resources and earned sixty percent of the parties' combined incomes, the court concluded that the trial court could not have recognized the requirement of "rough proportionality" when it apportioned more than eighty percent of the educational costs to the father.¹¹⁴

Finally, in accordance with apportioning the costs, the supreme court noted that the trial court apparently did not attach proper weight to

107. *Carr*, 600 N.E.2d at 944.

108. *Id.* at 944-45.

109. *Id.* at 945.

110. *Id.* at 945-46.

111. Indiana Child Support Guideline 3(E)(3) states that in the court's computation "[s]ources of income available to the children may include, but are not limited to, scholarships, grants, student loans and summer and school year employment."

112. *Carr* 600 N.E.2d at 946.

113. *Id.*

114. *Id.*

the child assuming some of the costs of her education. Thus, the court held by inference that the trial court should have fashioned an order that would place responsibility on the child to do so, and which would provide for remittance to the father in the event loans were obtained:

The order did not place any responsibility on [the daughter] to actually seek grants, loans or employment. Moreover, while the order provides for the contingency of non-repayable aid, no remittance is prescribed should loans be received. The guidelines and the statutes contemplate that these cost-reducing measures will be factored into college expense orders where their potential is raised by the record.¹¹⁵

*Merrill v. Merrill*¹¹⁶ appears to be the first post-Guideline decision upholding a trial court's refusal to exclude from gross income payments of principal on loans attributable to business ventures.¹¹⁷ In *Merrill*, the father appealed from a judgment modifying his weekly child support payment from fifty dollars a week to one hundred seventy-seven dollars a week on the grounds that the trial court erred by failing to deduct principal payments on business loans from gross profit in his closely held corporation in determining his weekly income available for child support purposes.¹¹⁸ He also claimed it was error to include a portion of his retained earnings in his corporation as disposable income.¹¹⁹

The court first noted that Child Support Guideline 3 "[s]pecifically excluded from ordinary and necessary expenses for purposes of these Guidelines . . . depreciation, investment tax credits, or any other business expense determined by the Court to be inappropriate for determining weekly gross income."¹²⁰ Thus, the court stated that the Guideline vests discretion with the trial court "to scrutinize the self-employed parent's financial situation closely, and to exclude as a business expense any expenditure which the court in its discretion finds will personally benefit the parent."¹²¹ In this particular case, the father's principal payments over the years took his business from a fledgling pharmacy having a negative net worth to a business with a positive net worth solely owned by the father.¹²²

115. *Id.*

116. 587 N.E.2d 188 (Ind. Ct. App. 1992).

117. *Id.* at 190

118. *Id.* at 189.

119. *Id.* at 189-90.

120. *Id.* at 190 (quoting Indiana Child Support Guideline 3).

121. *Id.*

122. *Id.*

Concerning the father's complaint that the trial court erred by including one-half of his pharmacy's retained earnings for the prior year in the support calculation, the court on appeal noted that the trial court should consider the needs of the noncustodial parent pursuant to section 31-1-11.5-12(a)(4) of the Indiana Code:¹²³ "the court may order either parent or both parents to pay any amount reasonable for support of a child, without regard to marital misconduct, after considering all relevant factors including . . . [t]he financial resources and needs of the noncustodial parent."¹²⁴ Despite the father's testimony that the retained earnings were rolled-over to purchase inventory and to pay bills, and that the viability of small businesses in his area was declining, the court held it was not an abuse of discretion to include half of the retained earnings in the support calculation.¹²⁵ Thus, courts must determine on a case-by-case basis sound business practices and business deductions that actually benefit support obligors by reducing their expenses or increasing their net worth.

In *Zakrowski v. Zakrowski*,¹²⁶ Judge Staton, the author of the *Merrill* decision, found erroneous a trial court's exclusion of business expenses in the support calculation on the basis that they were capital investments rather than true business expenses.¹²⁷ In *Zakrowski*, the trial court excluded numerous expenditures as capital investments.¹²⁸ On appeal, the court agreed that the evidence established that some of the "business expenditures" were actually "investments" benefitting the father. On the other hand, the court disagreed with the trial court's finding that the total commercial mortgage payments represented a capital investment, because the trial court's finding was contrary to certain undisputed testimony.¹²⁹ From *Merrill* and *Zakrowski*, it is apparent that where determination of income for purposes of calculating support under the Guidelines is complicated by the self-employment of one of the parties, the court may properly consider that parent's "total financial circumstances, including net worth, access to credit and available financial flexibility."¹³⁰

*Cobb v. Cobb*¹³¹ perpetuates disparate treatment of support obligors whose children's custodial parent incurs child care expenses in order to

123. *Id.* at 189.

124. IND.CODE § 31-1-11.5-12(a)(4) (1988 & Supp. 1992).

125. *Merrill*, 587 N.E.2d at 190-191.

126. 594 N.E.2d 821 (Ind. Ct. App. 1992).

127. *Id.* at 824.

128. *Id.* at 823-24.

129. *Id.*

130. *Id.* (citing *Merrill v. Merrill*, 587 N.E.2d 188, 190 (Ind. Ct. App. 1992); *Cox v. Cox*, 580 N.E.2d 344, 351 (Ind. Ct. App. 1991)).

131. 588 N.E.2d 571 (Ind. Ct. App. 1992).

work. This disturbing case is not the first to hold that (1) the trial court has the discretion to include work-related child care expenses, and (2) a failure to address those work-related child care expenses does not require a written finding of explanation under Child Support Guideline 3.¹³²

In *Cobb*, several issues arose concerning the divorce court's setting of child support. The first issue concerned whether it was error for the trial court to base its child support calculation upon an unsigned child support worksheet.¹³³ The court concluded that basing child support on an unverified and unsigned child support worksheet was error where no findings were made regarding income.¹³⁴

Next, the mother complained that it was error to exclude deductions for the cost of children's health care insurance from her gross weekly income for purposes of computing the support amount.¹³⁵ The father argued that because Child Support Guideline 3(C)(3) stated that a trial court "should" consider the cost of the children's health insurance in arriving at the basic support obligation, discretion to deduct such amount remained with the trial court.¹³⁶ The father's interpretation of "should" was the same as that found in *Carter v. Morrow*¹³⁷ and *Kyle v. Kyle*,¹³⁸ in which "should" was interpreted as not being a mandatory term when applied to the consideration of work-related child care expenses. The court, however, disagreed with such an interpretation by holding that "should" in this context was mandatory because of language found in the commentary. Thus, it was error for the trial court not to deduct health care expenses from the mother's income.¹³⁹

132. See text accompanying note 84 *supra*. The bold holding of *Cobb*, permitting flagrant disregard of work-related child care expenses, is readily distinguishable from *Carter v. Morrow*, 563 N.E.2d 183 (Ind. Ct. App. 1990), and *Kyle v. Kyle*, 582 N.E.2d 842 (Ind. Ct. App. 1991), upon which it relies. In *Carter* there was no work-related child care at the time of hearing; rather, the issue was whether the mother should have received past support, prior to establishing paternity, which included child care expenses. 563 N.E.2d at 186-187. In *Kyle*, the appellate court approved a support agreement which did not include work-related child care in its calculation; rather, the trial court made a separate order for child care proportional to each parent's income. 582 N.E.2d at 847-48.

133. *Cobb*, 588 N.E.2d at 574-75.

134. *Id.*

135. *Id.* at 575.

136. *Id.*; Indiana Child Support Guideline 3(C)(3) states that, "[f]or each child support order, consideration should be given to the provision of adequate health insurance coverage for the child only. Such health insurance should normally be provided by the parent that can obtain the most comprehensive coverage through an employer at the least cost."

137. 563 N.E.2d 183 (Ind. Ct. App. 1990).

138. 582 N.E.2d 842 (Ind. Ct. App. 1991).

139. *Cobb*, 588 N.E.2d at 575.

Lastly, the mother argued that the court erred by not including her work-related child care costs in calculating support.¹⁴⁰ This assertion provided the basis for the court's troublesome reliance upon *Carter* and *Kyle* and arrival at the same conclusion in this case.¹⁴¹ The undisputed testimony was that the father's income was more than twice the mother's income.¹⁴² Further, the mother testified that she paid health insurance premiums of \$31.50 per week and work-related child care costs of seventy-five dollars per week.¹⁴³ The court on appeal adhered to the interpretations of the First District in *Kyle* and *Carter* finding "should" was not mandatory. The difference in support to the mother was approximately seventy dollars per week.¹⁴⁴

The failure to include work-related child care expenses in the support calculation or in a separate order can cause substantially disparate treatment between support obligors and support recipients. This is manifestly contrary to the intent of the Child Support Guidelines to "make awards . . . equitable."¹⁴⁵ Nonetheless, the Fifth Circuit Court of Appeals apparently felt obliged to follow the lead of the First Circuit, even though *Carter* and *Kyle* were readily distinguishable:¹⁴⁶

While we recognize the important public policy goal that custodial parents should be able to afford to work, we nevertheless hold that whether or not to increase a basic child support award to offset employment-related child care expenses is a matter for the trial court's discretion and the court's decision not to allow such an increase does not require a written finding of explanation under Child Support Rule 3. . . . The trial court here committed no error by failing to include [the mother's] work-related child care costs when it calculated the total child support obligations without articulating reasons for doing so.¹⁴⁷

III. MISCELLANEOUS

Three important cases were decided during this survey period which do not fit neatly into an analysis of family law developments centered upon custody, support and property distribution. These cases involved liability for family torts, liability to third parties for a spouse's debt,

140. *Id.*

141. *Id.* at 574-76.

142. *Id.* at 573.

143. *Id.*

144. *Id.* at 573, 575-76.

145. Indiana Child Support Guideline 1, Preface.

146. *See supra* note 132.

147. *Cobb*, 588 N.E.2d at 576 (citation omitted).

and the right of a putative father to establish paternity of a child born during the mother's marriage to another person.

In *Barnes v. Barnes*,¹⁴⁸ the Indiana Supreme Court held that the doctrine of parental tort immunity does not preclude an action predicated upon a claim of intentional felonious conduct by the parent where there is no issue of parental privilege.¹⁴⁹ In *Barnes*, the daughter commenced a personal injury lawsuit against her divorced father two weeks before her eighteenth birthday, and approximately three months after the dissolution of her parents' marriage. The daughter alleged that her father committed multiple acts of rape and other sexual brutality upon her during a four day period when she was fifteen years of age, which resulted in various injuries to her including post-traumatic stress disorder.¹⁵⁰ The jury awarded the daughter a judgment of \$250,000 in compensatory damages and three million dollars in punitive damages.¹⁵¹ The father's appeal raised the issues of the tort immunity rule, the Indiana Rape Shield Statute¹⁵² and other contentions concerning damages.¹⁵³ The court of appeals reversed the judgment and remanded with instructions to enter a judgment of dismissal in favor of the father.¹⁵⁴

On transfer, the father contended that the trial court erred by denying his motion to dismiss, which asserted the doctrine of parental tort immunity.¹⁵⁵ This doctrine provides parents with immunity from personal injury damage actions brought by their minor children for injuries sustained during the marriage. The daughter argued that the doctrine should be abrogated because it no longer served society, and had been eroded by exceptions.¹⁵⁶ She urged rejection of the parental tort immunity doctrine, asserting reasons similar to those that were involved with the abrogation of interspousal tort immunity in *Brooks v. Robinson*.¹⁵⁷

The Indiana Supreme Court noted that the law of parental tort immunity was in flux throughout the country: a substantial majority of jurisdictions have limited the doctrine; a few have eliminated it entirely; and despite the many variations throughout the states, it appears that no state allows immunity concerning intentional or malicious torts.¹⁵⁸ The court observed that, "[d]etermination of the present appeal, however,

148. 603 N.E.2d 1337 (Ind. 1992).

149. *Id.* at 1342.

150. *Id.* at 1339.

151. *Id.*

152. IND. CODE § 35-37-4-4(a) (1988).

153. *Barnes*, 603 N.E.2d at 1339.

154. *Barnes v. Barnes*, 566 N.E.2d 1042 (Ind. Ct. App. 1991).

155. *Barnes*, 603 N.E.2d at 1339.

156. *Id.* at 1339-40.

157. 284 N.E.2d 794 (Ind. 1972).

158. *Barnes*, 603 N.E.2d at 1340-41.

does not require us to decide whether to generally abrogate the immunity in parental negligence cases.”¹⁵⁹ After reviewing the primary cases from the Indiana courts of appeal in this area, the supreme court stated:

[N]otwithstanding *Smith*,¹⁶⁰ the discussions in *Treschman*¹⁶¹ and *Vaughan*¹⁶² provide support for the view that parental immunity should not be absolute. No Indiana case has applied the immunity to shield a parent from an action alleging intentional felonious conduct. . . . We conclude that when, as here, a cause of action is predicated upon a claim of intentional felonious conduct and there is no issue of parental privilege, the doctrine of parental tort immunity will not apply to preclude the action.¹⁶³

Although the court upheld the plaintiff's right to bring her cause of action, it provided that the Rape Shield Statute was not applicable to a civil action, and thus, did not exclude evidence of the daughter's prior sexual history. The court further concluded that the father could present proof of his payment of medical and psychiatric expenses, and that the constitutionality of the punitive damages need not be reached.¹⁶⁴

In *In re Paternity of S.R.I.*,¹⁶⁵ the Indiana Supreme Court held that section 31-6-6.1-2(a)(2) of the Indiana Code¹⁶⁶ allows a man claiming to be a child's biological father to file a paternity action without regard to the marital status of the mother: “Thus a putative father may establish paternity without regard to the mother's marital status, so long as the petition is timely filed. . . . Of course, the putative father must put forth evidence that is ‘direct, clear, and convincing’ to rebut the presumption that a child born during marriage is legitimate.”¹⁶⁷ In *S.R.I.*, the child was born during his mother's marriage, which was dissolved several years later.¹⁶⁸ The divorce decree referred to the child as an issue of the marriage.¹⁶⁹ After the mother and her husband divorced, she commenced living with the alleged father who assumed support of the child.¹⁷⁰

159. *Id.* at 1341.

160. *Smith v. Smith*, 142 N.E. 128 (Ind. App. 1924).

161. *Treschman v. Treschman*, 61 N.E. 961 (Ind. App. 1901).

162. *Vaughan v. Vaughan*, 316 N.E.2d 455 (Ind. Ct. App. 1974).

163. *Barnes*, 603 N.E.2d at 1342.

164. *Id.* at 1343, 1344-46.

165. 602 N.E.2d 1014 (Ind. 1992).

166. “A paternity action may be filed by . . . [a] man alleging that he is the child's biological father.” IND. CODE § 31-6-6.1-2(a)(2) (1988 & Supp. 1992).

167. *S.R.I.*, 602 N.E.2d at 1016 (quoting *Fairrow v. Fairrow*, 559 N.E.2d 597, 600 (Ind. 1990)).

168. *Id.* at 1015.

169. *Id.*

170. *Id.*

When the alleged biological father filed his petition to establish paternity, he attached to it his affidavit acknowledging paternity and blood tests purporting to show that he was the biological father of the child.¹⁷¹ The trial court denied the paternity petition, ruling that the question of paternity was *res judicata*.¹⁷² Although a divided court of appeals concluded that the finding of *res judicata* was error, it affirmed the trial court on public policy grounds favoring stability in the relationships between children and parents.¹⁷³

On transfer to the Supreme Court, the court noted a competing substantial public policy favoring the support of children by their actual father.¹⁷⁴ This public policy supported the putative father's attempt to establish paternity, as well as casting favorably upon the more personal aspects of his relationship with the child, such as custody and the right to supervision. In seeking to avoid a decision that might permit disruption of established relationships, however, the court stated as follows:

Under these unusual circumstances, [the putative father] ought to have his day in court and an opportunity to present his evidence. Whether a cause of action like this one would be permitted while the mother's marriage is intact is not presented in this case, and we do not decide that question.¹⁷⁵

A final case concerned the liability of an estranged spouse for the medical debts of her husband. In *Bartrom v. Adjustment Bureau, Inc.*,¹⁷⁶ the trial court granted summary judgment against the wife for the substantial medical debts of her husband who was injured after the parties' separation and filing for divorce.¹⁷⁷ While in the hospital and on life support systems, the wife did not visit the husband, and made no decisions concerning his care and removal from life support.¹⁷⁸ It was clear that had provisional orders been entered, the husband would have been required to support the wife and their children *pendente lite*.¹⁷⁹

The issue of whether the wife was liable for the medical expenses incurred by her husband after she had filed for divorce, and where no support order had been entered, was one of first impression.¹⁸⁰ Judge

171. *Id.*

172. *Id.*

173. *In re Paternity of S.R.I.*, 588 N.E.2d 1278 (Ind. Ct. App. 1992).

174. *S.R.I.*, 602 N.E.2d at 1016.

175. *Id.*

176. 600 N.E.2d 1369 (Ind. Ct. App. 1992).

177. *Id.* at 1370.

178. *Id.*

179. *Id.*

180. *Id.*

Chezem, speaking for the Fourth District, proceeded through a thoughtful analysis of the evolution of the common law rule that, "in the absence of a support or maintenance decree pending a divorce action, a spouse is primarily liable for medical expenses incurred by the other spouse."¹⁸¹ At common law, a husband was responsible for the necessities of his spouse, but she was not similarly liable because she was legally incapable of incurring an independent obligation. With the enactment of the Married Woman's Act,¹⁸² all legal disabilities of married women were abolished. Thus, the current modified common law rule in Indiana places primary liability on the purchasing spouse and secondary liability on the non-debtor spouse, regardless of whether the latter knows of the purchases, promises to pay for them or has sufficient financial resources to satisfy them.¹⁸³

In *Bartrom*, the widow received approximately eight thousand dollars in marital equity, and approximately thirty-three thousand dollars in marital debt. Based on those hard facts, the court entered a ruling that Mrs. Bartrom was not liable:

We hold that unless a dissolution court otherwise orders, one spouse is not liable for the debts of another spouse when a Petition of Dissolution of Marriage has been filed and, but for the untimely death or incapacity of the spouse who incurred the debt, that spouse would have been responsible for the support and maintenance of the other spouse and children. Because the debt was incurred by decedent after the date of final separation, it will not be apportioned to Bartrom.¹⁸⁴

If, however, a similar case arises with identical facts except that the marital estate clearly has financial resources to cover such expenses, the result may depend upon the weight accorded to the court's reasoning: arguably, the last sentence of the above quote might prove too expansive.¹⁸⁵

181. *Id.* at 1371.

182. The Married Woman's Act was first enacted in Indiana in 1879. 1879 Ind. Acts 160-61. The Act was substantially re-enacted in 1923. 1923 Ind. Acts, Chapter 63. In 1986, the remaining codification of the original Act was repealed by P.L. 180-1986, § 6.

183. *Bartrom*, 600 N.E.2d at 1371-72.

184. *Id.* at 1374.

185. For another situation involving medical expenses that were incurred by a husband after the divorce hearing but before entry of a decree because his wife removed him from medical insurance coverage, see *Schueneman v. Schueneman*, 591 N.E.2d 603 (Ind. Ct. App. 1992), discussed in text accompanying note 33 *supra*. The husband asked the Court of Appeals to expand the application of *In re Marriage of Adams*, 535 N.E.2d 124 (Ind.

IV. CONCLUSION

Although the Indiana courts issued decisions mostly reflecting the application of established precedent to typical permutations of property division, custody and support, they left such issues as the following for future decisions: while parental immunity does not bar actions for felonious torts, to what extent will abrogation of the rule be permitted for less egregious conduct? While a putative father may bring a paternity action regarding the "child of a marriage" after dissolution the marriage, under what circumstances can the putative father bring such action during the mother's marriage? Will decisions permitting a trial court to forego provision for work-related child care expenses cause such disparate treatment that the issue will be addressed by the Indiana Supreme Court? These issues are sure to arise in the future.

1989), and *Kirkman v. Kirkman*, 555 N.E.2d 1293 (Ind. 1990), to include as marital debts, medical expenses incurred after the date of filing but before the date the dissolution was granted. The husband attempted to draw an analogy to *Adams* and *Kirkman* in that they included, as marital property, pensions vesting *after* the date of filing but before the dissolution petition had been granted, as being within the marital estate.

Rejecting the husband's argument, the court of appeals noted that pensions are acquired by the joint efforts of both spouses during the marriage and are therefore dissimilar from debts incurred subsequent to the filing of the dissolution petition. Declining to extend the long-standing rule that the marital pot is closed (at least as to debts) when the petition is filed, the court rejected the husband's argument. *Schueneman*, 591 N.E.2d at 609-10.

1992: A Year of Change for Our Health Care System

ROLANDA MOORE HAYCOX*

It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.¹

Solutions are being proposed for the health care "crisis" without [a] thorough understanding of the present problems, without answering questions . . . and without a clear vision of what we are trying to create.²

Health care reform is a topic that is frequently discussed at legislatures, round table discussions, universities, hospitals, workplaces, and dinner tables. The debate begins with "basic" concepts, such as: "Is health care a right or a privilege?" Although to some the answer seems obvious, resolution of the question is something Americans have been unable to grasp. While legislators discuss the specifics of funding health care programs and health services researchers analyze the effects of various payment methodologies on the market, the "average" American asks: "What will happen if I get sick?"

State legislators have been unable to provide solutions because their budgets simply cannot cover the costs of initiatives that will provide health insurance for a state's entire citizenry. Although some point to Canada or Massachusetts or Hawaii as models for health care reform, the answers may lie elsewhere. In fact, the answers may lie in Indiana.

This Article will discuss the initiatives for change proposed for our state's health care system. This Article will first survey the cases involving the state's Medicaid and Hospital Care for the Indigent programs. It will then provide a summary of the proposed eligibility requirements and benefits for the program for children with special health care needs.

* Associate, Baker & Daniels, Indianapolis. B.S.N., 1986, Indiana University School of Nursing; M.H.A., 1992, Indiana University School of Public & Environmental Affairs; J.D., 1992, Indiana University School of Law—Indianapolis. The author would like to thank Professor Eleanor Kinney for her comments in the preparation of this Article and for her continued support and patience. My thanks also to Scott Alfree for his assistance in preparing this Article for publication.

1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

2. Indiana Commission on State Health Policy, *HoosierHealth Reform* 4-3 (Nov. 1992) [hereinafter *Health Policy Report*] (on file with the author).

Finally, the Article will examine the proposals for change made by Governor Evan Bayh and the Indiana Commission on State Health Policy (Health Policy Commission) and the possible direction that will be given to reforming our state's health care system.

I. ELIGIBILITY FOR INDIANA'S MEDICAID AND HOSPITAL CARE FOR THE INDIGENT PROGRAMS

An understanding of the state's Medicaid program is required before change can be discussed.³ The state is required by federal law to provide benefits to the "mandatory categorically needy."⁴ The mandatory categorically needy include recipients of Aid to Families with Dependent Children (AFDC); aged, blind, and disabled recipients of Social Security Income; and some low-income persons ineligible for AFDC or Social Security Income (SSI).⁵ A state's categorically needy population must also include children under one year old who are at or near the federal poverty level and children under age seven born after 1983 whose family income meets the state established income level.⁶ State Medicaid programs must provide the categorically needy with a variety of benefits, including hospital, skilled nursing, rural health clinic, laboratory, X-ray, children's health, and family planning services.⁷

The states also have the option of providing a medically needy program.⁸ A state medically needy program must provide benefits for certain pregnant women and children and may provide benefits for the aged, blind, and disabled whose incomes are below the federal poverty level.⁹ In general, state medically needy programs provide benefits to persons who meet the age and family requirements of the state's categorically needy program, but who, after the payment of medical services, have incomes less than 133 1/3% of the maximum AFDC payment for the same size family.¹⁰

3. For a general discussion of the federal Medicaid program, see CONG. RES. SERV., 103D CONG., 1ST SESS., MEDICAID SOURCE BOOK: BACKGROUND DATA AND ANALYSIS (A 1993 UPDATE) (Comm. Print 1993).

4. 42 U.S.C. § 1396a(a)(10) (1988 & Supp. III 1992); 42 C.F.R. §§ 435.100-435.138 (1992).

5. 42 U.S.C. § 1396a(a)(10); 42 C.F.R. §§ 435.100-435.138. *See generally* 3 Medicare & Medicaid Guide (CCH) ¶ 14,311 (1992).

6. 42 U.S.C. § 1396a(a)(10); 42 C.F.R. § 435.117.

7. 42 U.S.C. §§ 1396a(a)(10)(C), 1396d(a); 42 C.F.R. § 440.210. *See generally* 3 Medicare & Medicaid Guide (CCH) ¶ 14,511 (1992).

8. 42 U.S.C. § 1396a(a)(10)(A)(ii); 42 C.F.R. §§ 435.301-435.350. *See also* 1993-1 Medicare & Medicaid Guide (CCH) ¶ 40,984 (new final regulations concerning Medicaid eligibility for optional groups).

9. 42 U.S.C. § 1396a(a)(10)(A)(ii); 42 C.F.R. § 435.301.

10. 3 Medicare & Medicaid Guide (CCH) ¶ 14,311 (1992).

The federal Medicaid laws require that a state medically needy program provide certain benefits,¹¹ but any additional benefits may include a variety of preventive, diagnostic, and rehabilitative services. However, the benefits provided under the state's medically needy program cannot exceed the benefits provided under its categorically needy program.¹² Indiana does not provide a medically needy program, although the idea of implementing such a program has support from various circles.

Benefits under Indiana's Medicaid program are provided to persons receiving monthly assistance payments or medical services and persons eligible for AFDC or the state supplemental assistance program for the aged, blind, or disabled.¹³ Other persons who are eligible for state Medicaid benefits include patients in institutions for the mentally ill or mentally retarded, participants in the Indiana long-term care program,¹⁴ and certain pregnant women and children.¹⁵ The Indiana Medicaid program provides a variety of services that are not required under federal law, including optometric services, nonmedical nursing care given in accordance with religious tenets of a recognized church, and podiatry services.¹⁶

The state's Medicaid program has become the primary target for change. Two Medicaid-related cases decided in 1992 are worthy of note: the first involves the resource spend-down requirement, and the second involves the ongoing debate over the validity of the Medicaid rate-setting system under the Boren Amendment.

A. Medicaid Eligibility

In 1992, the Indiana Court of Appeals was given the opportunity to examine the resource spend-down requirement under Indiana's Medicaid program and concluded, in *Indiana Department of Public Welfare v. Payne*,¹⁷ that the Department of Public Welfare¹⁸ must allow applicants

11. If a state elects to establish a program for the medically needy, that program must provide prenatal care and delivery services, ambulatory services for individuals under 18 years old and individuals entitled to institutional services, home health services for individuals entitled to skilled nursing facility services, and certain services if the state elects to provide services for the institutionalized mentally ill or mentally retarded. 42 C.F.R. § 440.220 (1992). See also 3 Medicare & Medicaid Guide (CCH) ¶ 14,511 (1992).

12. 42 C.F.R. § 440.240.

13. IND. CODE § 12-15-2-3 (Supp. 1992).

14. *Id.* §§ 12-10-9-1 to -11. See also 16 Ind. Reg. 1145-59 (1993) (adding IND. ADMIN. CODE tit. 760, r. 2-20-1 to -43).

15. IND. CODE §§ 12-15-2-8 to -16 (Supp. 1992).

16. *Id.* § 12-15-5-1.

17. 592 N.E.2d 714 (Ind. Ct. App. 1992).

18. Although the cases described refer to the Department of Public Welfare, the state Medicaid program is now administered by the Office of Medicaid Policy and Planning. IND. CODE §§ 12-8-6-1, 12-15-1-1 (Supp. 1992).

to spend down their resources to become eligible for Medicaid benefits.¹⁹ Litigation to determine eligibility for Medicaid benefits in some cases is legitimate, but it also illustrates a growing concern that potential program recipients and their lawyers are manipulating the eligibility rules to gain access to the program's many benefits.

Hazen Payne was a construction laborer who developed leukemia and was hospitalized at the Indiana University Medical Center for five months, accumulating medical bills of approximately \$150,000. Payne applied for Medicaid benefits to cover these expenses, but was denied eligibility for the period for which he was hospitalized because he owned resources in excess of the Department's financial eligibility requirements.²⁰

The trial court reversed the Department's decision, and the court of appeals affirmed.²¹ The court's decision was based on the status of Indiana's Medicaid program as a "section 209(b)" program.²² Section 209(b) of the federal Medicaid statute allows state legislatures to elect to provide Medicaid benefits only to persons who would have been eligible under the state's Medicaid plan as it existed on January 1, 1972.²³ This provides state legislatures with the option of using more restrictive criteria for Medicaid eligibility than the SSI eligibility criteria, which tend to be more generous.²⁴

When Payne applied for benefits, the Department used its resource limitation regulation, which requires the valuation of resources on the first day of the month, to determine his eligibility for benefits.²⁵ The

19. *Payne*, 592 N.E.2d at 724. In other words, once an applicant applies his or her excess resources toward any incurred but unpaid medical bills, under Indiana's rules in 1972, the remaining bills will be eligible for Medicaid reimbursement. *See also* Roloff v. Sullivan, 975 F.2d 333, 338 (7th Cir. 1992) (explaining the resource spend-down rule).

20. Payne owned a wooden wagon, a buggy, a nonmotorized camper, and a stock trailer.

21. *Payne*, 592 N.E.2d at 726.

22. *Id.* at 721-22.

23. 42 U.S.C. § 1396a(f) (1988 & Supp. II 1990); 42 C.F.R. § 435.121 (1992). *See* Schweiker v. Gray Panthers, 453 U.S. 34, 38-39 (1981).

24. On rehearing, the court stated that section 209(b) requires a state to provide Medicaid benefits to persons who would be eligible under the criteria as they existed on January 1, 1972, and these criteria apply even if they are more liberal than the criteria used in SSI states. *Indiana Dep't of Pub. Welfare v. Payne*, 598 N.E.2d 608, 610 (Ind. Ct. App. 1992) (citing 42 U.S.C. § 1396a(r)(2)).

25. An applicant or recipient is ineligible for medical assistance for any month in which the total equity value of all nonexempt resources exceeds the applicable limitation, set forth below, *on the first day of the month*:

(1) \$1,500 for the applicant or recipient, including the amount determined in (b) below, if applicable; or

(2) \$2,250 for the applicant or recipient and his spouse.

Payne, 592 N.E.2d at 720 (quoting IND. ADMIN. CODE tit. 470, r. 9.1-3-17(a) (1988)) (emphasis added).

court rejected the Department's argument that its regulation is based on a statute providing the resource limitations for Medicaid eligibility because the statute concerns only money, stocks, bonds, and life insurance.²⁶ The court also noted that the statute does not prohibit a resource spend-down, although such a spend-down would be consistent with its principles.²⁷ The court added that a resource spend-down requirement is not inconsistent with the first day of the month rule because the applicant's resources would still have to meet the \$1,500 limitation as evaluated on the first day of the month.²⁸

The court also determined that the state's plan on January 1, 1972,²⁹ and the Department's Medicaid Manual allowed a resource spend-down.³⁰ The court concluded that because the Department may not use more restrictive criteria than those in place on January 1, 1972, it was required to allow Payne to spend down his resources to attain eligibility for the state Medicaid program.³¹

Transfers of property to attain eligibility for the state's Medicaid program are a target for change in the reform of our state's Medicaid program. This term, legislation was introduced to prevent potential

26. *Id.* at 721. At the time of this case, the statute read:

An applicant for, or recipient of, medical assistance, is ineligible for that assistance if the total cash value of money, stocks, bonds and life insurance owned by:

(1) the applicant or recipient exceeds fifteen hundred dollars (\$1,500), in the case of medical assistance to the aged, blind, or disabled.

(2) the applicant, or recipient, and his spouse exceeds two thousand two hundred fifty dollars (\$2,250), in the case of medical assistance to the aged, blind, or disabled.

Id. (quoting IND. CODE § 12-1-7-18.5(a) (1988)).

27. *Id.*

28. *Id.* at 723. The first day of the month rule has been found not to violate the "reasonable standards" requirement of 42 U.S.C. § 1396a(a)(17). *Roloff v. Sullivan*, 975 F.2d 333, 342 (7th Cir. 1992). The *Roloff* court refrained from giving blanket approval to Indiana's first day of the month rule, but left open the possibility that a resource spend-down may be allowed for persons with resources below the SSI eligibility limit. *Id.* at 341.

29. The state's plan contained the following regulatory provisions:

(c) Possession of intangible personal property with an available liquid cash value in excess of the standard resource allowance shall render an applicant ineligible for assistance, and *utilization of some of the resources down to the amount of the standard resource allowance is necessary before the applicant can be found eligible.*

(d) Possession of intangible personal property with an available cash value which has increased to be in excess of the standard resource allowance shall not make a recipient ineligible for assistance providing the recipient is willing to make the necessary adjustments and has taken immediate steps to do so.

Payne, 592 N.E.2d at 722 (quoting Ind. State Dep't of Public Welfare, r. 2-114).

30. *Id.* (citing IND. ADMIN. CODE tit. 470, r. 9-3-2(22.2), 9-4-3(12) (1979)).

31. *Id.* at 724.

applicants from engaging in certain transfers of property to obtain Medicaid eligibility.³² Under the proposed legislation, the Office of Medicaid Policy and Planning would be instructed to promulgate rules that:

- (1) Establish policies and procedures that improve the state's ability to verify ownership and interests in a Medicaid recipient's property and transfers of property;
- (2) Define terminology involved in Medicaid estate planning;
- (3) Define impermissible trusts established to shelter assets for purposes of obtaining Medicaid eligibility;
- (4) Specify that the transfer of asset restrictions apply to all of a Medicaid recipient's property, including property exempt from Medicaid eligibility determination; and
- (5) Establish methods to increase the documentation of sheltered assets to assure that the asset values and dispositions can be traced by the Office.³³

Any health reform measures considered for the state should include a review of the Medicaid eligibility requirements and the means by which potential recipients may shelter funds. With the introduction of this legislation, the General Assembly started to take this step.

B. Boren Amendment

The second Medicaid case decided in 1992 involves the adequacy of the program's rate-setting methodologies for extended care facilities. This case is merely another decision in the ongoing litigation by various extended care facilities located throughout Indiana over the legality of the state's rate-setting system for nursing homes.³⁴ Unfortunately, although state resources are being used to litigate an alleged wrong under the state's Medicaid regulations, state legislators and the Office of Medicaid Policy and Planning have been unable to find a solution to resolve

32. S.B. 232, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE 12-15-38); H.B. 1921, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE 12-15-38).

33. S.B. 232, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 12-15-38-15); H.B. 1921, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 12-15-38-15). Indiana has adopted the federal transfer of assets provisions, which apply only to nursing home and equivalent medical institution services. 16 Ind. Reg. 1783 (1993) (adding IND. ADMIN. CODE tit. 405, r. 2-3-1(i)). See also 42 U.S.C. § 1396p(c) (1988 & Supp. III 1992).

34. *Indiana State Bd. of Pub. Welfare v. Tioga Pines Living Ctr., Inc.*, 592 N.E.2d 1274 (Ind. Ct. App. 1992).

the issues concerning the state's rate-setting system for extended care facilities. The Governor has also stated that our state must fight "the attempt by some nursing home owners to get more than \$150 million in unjustified payments from the taxpayers."³⁵

In last year's article on health care law, the authors discussed the case of *Indiana State Board of Public Welfare v. Tioga Pines Living Center, Inc.*,³⁶ which dissolved a preliminary injunction against the state in an action challenging a regulation linking increases in Medicaid reimbursement for nursing homes to the Gross National Product Implicit Price Deflator.³⁷ The promulgation of this regulation resulted from the enactment of the Boren Amendment, which requires state Medicaid programs to provide for "reasonable and adequate" rates to meet the costs of care provided.³⁸ Last year's article noted that "[a] decision on the merits in this case will have important implications for future Medicaid payment policy in Indiana."³⁹ While undoubtedly true, practitioners anticipating the final chapter in the *Tioga Pines* case must wait a little longer.⁴⁰

This year, in the latest published decision in the *Tioga Pines* case, the Indiana Court of Appeals held that computer simulations reflecting Medicaid reimbursement methodologies that were considered, but not adopted, by the Department of Public Welfare were protected by the work product doctrine.⁴¹ These methodologies were a part of the state's

35. Governor Evan Bayh, 1993 State of the State Address: Cornerstones of Progress (Jan. 26, 1993) (transcript on file with the author).

36. 575 N.E.2d 303 (Ind. Ct. App. 1991). See Vaneeta M. Kumar & Eleanor D. Kinney, *Indiana Lawmakers Face National Health Policy Issues*, 25 IND. L. REV. 1271, 1279-81 (1992).

37. *Tioga Pines*, 575 N.E.2d at 307.

38. A State plan for medical assistance must—

(13) provide—

(A) for payment . . . of the hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded provided under the plan through the use of rates . . . for lower reimbursement rates reflecting the level of care actually received . . . which the State finds . . . are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards to assure that individuals eligible for medical assistance have reasonable access . . . to inpatient hospital services of adequate quality

42 U.S.C. § 1396a(a)(13)(A) (1988 & Supp. III 1992).

39. Kumar & Kinney, *supra* note 36, at 1281.

40. The Indiana Supreme Court heard arguments in this case on April 28, 1993. *High Court Hears Arguments on State Nursing Home Payments*, INDIANAPOLIS STAR, April 29, 1993, at C4.

41. *Indiana State Bd. of Pub. Welfare v. Tioga Pines Living Ctr., Inc.*, 592 N.E.2d

attempt to promulgate a new reimbursement scheme after the trial started. Given the provision in Trial Rule 26(B)(3) protecting "documents and tangible things" prepared in anticipation of litigation or for trial,⁴² the court's decision is not surprising.

This term, Senator Johnson introduced Senate Bill 353, which would establish a Medicaid reimbursement methodology for nursing homes at rates that are reasonable and adequate to meet the costs of efficiently and economically running facilities.⁴³ The bill required that payment rates for reimbursement of resident care facilities "be reasonable and adequate to meet the costs (determined annually using generally accepted accounting principles) that must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable state and federal laws, rules, regulations, and quality and safety standards."⁴⁴ In addition, "[r]eimbursement for capital facility costs must be based on an objectively determined fair rental value of property, determined by an independent expert."⁴⁵ Although this bill failed to pass a third reading by the Senate, similar language was also introduced in Senate Bill 232 and House Bill 1921.⁴⁶

C. Hospital Care for the Indigent

Another target for change is the state's Hospital Care for the Indigent (HCI) program. The HCI program provides benefits to persons who meet the applicable resource and income guidelines for

any part of the cost of care provided in a hospital in Indiana that was necessitated after the onset of a medical condition that was manifested by symptoms of sufficient severity that the absence of immediate medical attention would probably result in any of the following:

1274, 1278 (Ind. Ct. App. 1992). The defendant class was allowed to discover only some personal notes and presentation materials of a consultant hired by the state to analyze the nursing home rate-setting system in Indiana. The consultant was hired to assist the state in the preparation of its defense.

42. IND. R. TR. PROC. 26(B)(3).

43. S.B. 353, 108th Gen. Assembly, 1st Reg. Sess. (1993) (amending IND. CODE § 12-15-14-2).

44. *Id.* (amending IND. CODE § 12-15-14-2(b)(2)(A)).

45. *Id.* (amending IND. CODE § 12-15-14-2(c)).

46. See S.B. 232, 108th Gen. Assembly, 1st Reg. Sess. (1993) (amending IND. CODE § 12-15-14-2); H.B. 1921, 108th Gen. Assembly, 1st Reg. Sess. (1993) (amending IND. CODE § 12-15-14-2). The provisions in these bills will be the subject of a special session of the General Assembly this term.

- (1) Placing the individual's life in jeopardy,
- (2) Serious impairments to bodily functions, or
- (3) Serious dysfunction of a bodily organ or part.⁴⁷

The HCI program is funded with property tax dollars and allocations of the financial institutions and motor vehicle excise taxes.⁴⁸

Two cases were decided in 1992 involving eligibility for benefits under the HCI program. In *County Department of Public Welfare of Vanderburgh County v. Deaconess Hospital, Inc.*,⁴⁹ Deaconess Hospital disputed the denial of its claim for payment of HCI benefits provided to a woman with suicidal tendencies. The woman was described as "dejected and depressed," but was not suffering from delusions or hallucinations and had not formulated a suicide plan. The County Department of Public Welfare denied the payment of HCI benefits to Deaconess, claiming that the patient's condition did not satisfy the statute's emergency hospitalization requirement. The State Department of Public Welfare agreed, basing its decision in part on a letter from the Medical Director—Medicaid to the Director of the County Department of Public Welfare that stated:

Qualifying emergency medical criteria, as applied to a diagnosis of depression with suicidal considerations, seeks documentation of a suicidal gesture rather than ideation alone. [Dr. Reigman's notes on Walker] record substantial indication of depression with suicidal thoughts or ideation, but no gesture. In addition, paranoid and psychotic symptoms were not noted. Thus, the medical review opinion [denied HCI benefits because "hospital admission does not meet the emergency criteria specified by state law."]

I would like to add that this decision is in no way meant to indicate that the hospitalization and treatment were inappropriate. Actually, the decision is based upon restrictive emergency criteria because of limitations in HCI funding.⁵⁰

The trial court reversed. On appeal, the Indiana Court of Appeals affirmed the decision of the trial court because the State Department of Public Welfare based its opinion on the unpromulgated standard that a suicidal patient must also evidence a "suicidal gesture."⁵¹ The court added that, although a hospital may be left without reimbursement if

47. IND. CODE § 12-16-3-1(a)(1)-(3) (Supp. 1992).

48. *Id.* § 12-16-14-1 to -9.

49. 588 N.E.2d 1322 (Ind. Ct. App. 1992).

50. *Id.* at 1327 (alterations in original).

51. *Id.*

the HCI program is underfunded, the State Department of Public Welfare cannot modify the statutory criteria for program eligibility to filter out some claims so that others may be reimbursed.⁵²

In *Lutheran Hospital of Indiana, Inc. v. Indiana Department of Public Welfare*,⁵³ the Indiana Court of Appeals held that persons suffering from drug or alcohol abuse qualify for HCI benefits for emergency medical treatment if the condition becomes life-threatening.⁵⁴ The HCI program, however, is not designed to provide rehabilitative care for drug and alcohol addiction.⁵⁵ The court also concluded that failure to provide benefits under the HCI program once the patient is physically stable does not mean that the HCI Act discriminates against persons who suffer from drug or alcohol abuse.⁵⁶

Litigation under the HCI program has not gone unnoticed. The Health Policy Commission's report states:

Indiana spent approximately \$33 million in total county funds for providing emergency services under the Hospital Care for Indigent (HCI) Program. HCI is underdefined and misaligned. The program is inadequate in addressing the health care needs of the uninsured in Indiana.

If Indiana were to use this money under the Medicaid program, the state would have approximately \$66 million more to serve the health care needs of Indiana's uninsured⁵⁷

Any health reform measures considered for the state should include a review of smaller programs, such as the HCI program, and a decision should be made concerning whether the funds from these programs should be diverted elsewhere to provide more comprehensive and efficient health care system. The Health Policy Commission Report and the cases leading to expensive litigation illustrate that taxpayers' dollars should not be spent on these types of programs.

II. CHILDREN WITH SPECIAL HEALTH CARE NEEDS

Another program of interest is the program for children with special health care needs (CSHCN program).⁵⁸ This program will provide medical

52. *Id.* at 1328.

53. 597 N.E.2d 1301 (Ind. Ct. App. 1992).

54. *Id.* at 1306.

55. *Id.*

56. *Id.*

57. Health Policy Report, *supra* note 2, at 21-24.

58. This program was implemented as a part of the national initiative to provide programs for mothers and children. These programs are funded by the Maternal and

benefits for persons under twenty-one years of age who have a physical condition that is expected to last at least two years if not treated and that necessitates more health care services than are generally required to treat the condition.⁵⁹ In addition, the physical condition must result in, or potentially result in, disability, disfigurement, limitation of function, or the need for a special diet or assistive device.⁶⁰ If none of these criteria are met, the child is eligible for benefits if nonintervention will lead to a chronic disabling physical condition within one year.⁶¹ Some examples of physical conditions that may qualify the child for benefits are apnea, arthritis, asthma, cerebral palsy, congenital anomalies, and cystic fibrosis.⁶² To qualify for benefits, the child must also apply for Medicaid benefits.⁶³

The CSHCN program is an example of a program that will provide benefits for children who might not otherwise be eligible for health care benefits. Although any proposal for change must include a determination of whether smaller programs should be allowed to survive, cost alone should not be the deciding factor. Recipients of benefits under the CSHCN program may not be eligible for other benefits to correct conditions that may create hardship throughout the child's life. In addition, the CSHCN program is partially funded by federal funds, unlike the HCI program, which is funded by local tax dollars.

These are the kinds of considerations that must be balanced in determining which programs the state can afford to maintain and which programs serve the greatest number of people in need. Only by identifying

Child Health Services Block Grant. 42 U.S.C. § 701 (1988 & Supp. II 1990). The statutory mission of the program is to "[e]xtend and improve services for locating children and for providing medical, surgical, corrective, and other services and care, and facilities for diagnosis, hospitalization, and aftercare for children who are suffering from conditions that lead to special health care needs." IND. CODE § 16-6.5-2-2(b)(1) (Supp. 1992). *Cf.* 42 U.S.C. § 701(a)(3)(F) (Supp. III 1992) (to develop and expand "outpatient and community based services programs . . . for children with special health care needs whose medical services are provided primarily through inpatient institutional care"). Additional appropriations for this program were proposed during this legislature session, but did not survive a reading by the House Ways & Means Committee. *See* H.B. 1189, 108th Gen. Assembly, 1st Reg. Sess. (1993).

59. 15 Ind. Reg. 2483-84, 2493 (1992) (adding IND. ADMIN. CODE tit. 410, r. 3.2-6-2(a)) (proposed rule).

60. *Id.* (adding IND. ADMIN. CODE tit. 410, r. 3.2-6-2(a)(3)).

61. *Id.*

62. Financial eligibility is based on the poverty income guidelines published by the Department of Health and Human Services. *Id.* at 2483-84, 2486, 2492-93 (adding IND. ADMIN. CODE tit. 410, r. 3.2-1-24, 3.2-6-1).

63. The State Department of Health will complete the processing of a child's application if the child is denied enrollment in the Medicaid program. *Id.* at 2483-84, 2488 (adding IND. ADMIN. CODE tit. 410, r. 3.2-2-4(a), (d)).

the benefits needed by our state's residents can the legislature make effective decisions concerning which programs to fund.

III. IMPLEMENTING CHANGE IN OUR STATE'S HEALTH CARE SYSTEM

In the judicial and administrative settings, the health care topics for 1992 were the resource spend-down requirement for the Medicaid program, the rate-setting formula for Medicaid reimbursement for nursing homes, eligibility for the Hospital Care for the Indigent Program, and the implementation of the program for children with special health care needs. When examined alone, these topics seem unrelated. Indeed, they are illustrative of the complex, patchwork-type approach used in structuring health care systems both nationally and within the state.

Any attempt at state health reform cannot look merely to the state's Medicaid program, or any other single program, as a means of cutting costs or streamlining care. Only if we first determine who is in need of care, and identify the benefits that we as a society are willing to provide, will any state health reform measure be successful. All too often, the legislature attempts to solve problems by focusing on only one program at a time. Instead, we must look at the residents of our state, and then, one by one, determine which programs will survive. This is not an easy task, and it requires the assistance of economists, health care providers, and health services researchers.

This term, the General Assembly faced an immense task as it struggled to tame the so-called "Medicaid monster." Medicaid expenditures are quickly crowding out other state health care initiatives, and state legislators are anxious to enact change. Yet, Medicaid is not the only concern whenever state policy reform is discussed in our state or elsewhere. Now is the time for our state to look at the entire package of health care programs offered through tax initiatives and to identify not only the changes that are needed, but also to identify the ways in which those changes can be implemented.

The cornerstone for health policy reform in Indiana has been set by Governor Evan Bayh. Governor Bayh's State of the State address⁶⁴ identified ten points for Medicaid reform as well as other ambitious means of providing a streamlined system of health care that will provide quality care to all those in need. The Governor proposed the following ten steps to ensure that Medicaid spending is decreased:

Number One: We must decrease the amount the State pays for Medicaid services. . . . If we reduce what Indiana spends per

64. Governor Evan Bayh, 1993 State of the State Address: Cornerstones of Progress (Jan. 26, 1993) (transcript on file with the author).

Medicaid recipient to just the national average, we would save nearly \$300 million annually. If we reduced our spending to that of Ohio, we would save nearly \$300 million annually, or Illinois or Michigan or Kentucky, nearly \$400 million every year.

Number Two: We must curtail Medicaid coverage for optional services not essential to good, basic health care and must more strictly regulate abuse of those optional services we keep.

Number Three: We must consider using money currently in other health care programs for the poor to pay Medicaid expenses.

Number Four: We must consider imposing co-payments on Medicaid patients to discourage unnecessary treatments and help offset costs.

Number Five: We must stop the manipulation of Medicaid eligibility rules by patients and their attorneys.

Number Six: We must consider limiting eligibility for the Indiana Medicaid program only to those individuals who are required by the federal government to be covered by Medicaid.

Number Seven: We must consider using only providers of health care services willing to give taxpayers the best price.

Number Eight: We must set limits on the kinds and number of health care procedures for which Medicaid will pay.

Number Nine: We must consider changing from a fee-for-service Medicaid system to a fixed payment approach. This would give both health care providers and recipients an incentive to provide only medically necessary care in the most cost effective way.

Number Ten: We must consider . . . imposing access charges on the health care industry to assist taxpayers in paying the state's share of Medicaid.⁶⁵

Governor Bayh also suggested further steps for reforming the state's health care system based on the recommendations of the Health Policy Commission. The Commission, which was chaired by Ben Lytle, President and CEO of Associated Insurance Companies, Inc., was formed in 1989 as a result of Senate Bill 385.⁶⁶ The legislature gave the Health Policy Commission the task of studying health policy in Indiana and making recommendations to improve the effectiveness of health care programs

65. *Id.*

66. Health Policy Report, *supra* note 2, at 2-1.

and the delivery of health care services in the state.⁶⁷ Specifically, the Health Policy Commission was asked to study access to health care, the cost of health care and its underlying factors, and preventive health care.⁶⁸ The Health Policy Commission did just that. In a report totalling almost 700 pages entitled *HoosierHealth Reform*, the Health Policy Commission outlined its strategy for change.

Based on the conclusions in this report, Governor Bayh recommended that the state legislature initiate reforms to permit health care providers to: (1) form networks to reduce costs; (2) improve access to health care and enhance quality of care; (3) reduce duplication of expensive technologies; (4) establish "best practice" guidelines for treating the most expensive illnesses; (5) fight our shortage of doctors, especially family practitioners, by encouraging graduates of Indiana University's medical school to remain in Indiana and practice family medicine; and (6) provide more extensive information to the public so we can be more knowledgeable health care consumers.⁶⁹

The Health Policy Commission's report outlines multiple strategies for implementing a comprehensive system of health reform in Indiana. The *HoosierHealth Reform* system consists of a primary care system of provider teams who are the primary point of access into the health care system,⁷⁰ a critical care system of competitive procurement among providers to treat patients whose diagnoses fall within a list of seventeen diagnoses that account for thirty-five percent of all health care costs,⁷¹ and an acute care system consisting of a hospital network system.⁷² The proposal also calls for establishing a clinical panel system to recommend clinical practice guidelines⁷³ and recommends antitrust law reforms to allow providers to network and to provide regional high technology care.⁷⁴ In addition, the plan calls for licensing reforms and management system and policy panels for the aggressive management of benefit plans.⁷⁵

In terms of Medicaid reform, the Health Policy Commission's report recommends the implementation of a medically needy program and expansion of the categorically needy program.⁷⁶ Funding for these pro-

67. *Id.*

68. *Id.*

69. Governor Evan Bayh, 1993 State of the State Address: Cornerstones of Progress (Jan. 26, 1993) (transcript on file with the author).

70. Health Policy Report, *supra* note 2, at 8-1 to 8-38.

71. *Id.* at 12-1 to 12-19.

72. *Id.* at 9-1 to 9-15.

73. *Id.* at 7-1 to 7-26.

74. *Id.* at 11-8.

75. *Id.* at 14-1 to -35, 16-1 to -3.

76. The Health Policy Commission recommended expanding Medicaid eligibility to children who are at or below 100% of the federal poverty level, through age 14 in 1994, and through age 18 by 1996. *Id.* at 21-2.

grams would come from state money currently dedicated to the HCI program, savings from streamlining health care services, and the adoption of a coordinated care model for the Medicaid program.⁷⁷ To support these proposals, the Commission stated its belief that by the year 1996, a medically needy program could provide health care benefits to 71,314 people who are at or below fifty percent of the federal poverty level.⁷⁸

The Health Policy Commission recommended a coordinated care model for the state's Medicaid program.⁷⁹ The coordinated care features of the program would include primary care case management, preferred provider networks, utilization management, and the use of clinical practice guidelines.⁸⁰ Medicaid recipients would be required to enroll with a primary care team that would provide all nonemergency care to the recipient.⁸¹

Implementation of the system proposed by the Health Policy Commission was the subject of this year's legislative session. The notion that our health care system should operate through a coordinated system of provider networks was supported by the proposal of legislation to allow cooperative agreements among hospitals. Legislation was introduced that would allow hospitals to enter cooperative agreements "if the probable benefits resulting from the cooperative agreements outweigh disadvantages attributable to a reduction in competition that may result from the cooperative agreements."⁸² These agreements could be for "the sharing, allocation, merger, or referral of patients, personnel, educational programs, support services and facilities, or medical, diagnostic or laboratory facilities or procedures, or other services generally offered by a hospital."⁸³ The intent of this legislative proposal was to provide sufficient

77. *Id.* at 21-1.

78. *Id.* at 21-2. A bill was introduced this session to establish a medically needy program in Indiana, but it failed to pass a first reading in the House of Representatives. See S.B. 595, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE 12-15.5).

79. Health Policy Report, *supra* note 2, at 21-6.

80. *Id.*

81. *Id.*

82. H.B. 1800, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 16-10-9-4(a)). See also H.B. 1921, 108th Gen. Assembly, 1st Reg. Sess. (1993) (also adding IND. CODE § 16-10-9-4(a)) (containing language that was substantially the same as that proposed in H.B. 1800); S.B. 232, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 16-10-9-4(a)) (also including substantially similar language). Similar legislation has been passed in Maine, Minnesota, Ohio, Washington, and Wisconsin. Melinda Amberg-Vajdic, *Indiana Bills Offer Hospitals Exemption from Antitrust Laws*, INDIANAPOLIS BUS. J., March 29-April 4, 1993, at 11A. House Bill 1800 failed to pass a third reading in the Senate; however, Senate Bill 232 and House Bill 1921 will be the subject of a special session of the General Assembly this term.

83. H.B. 1800, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE §

state action to bring these agreements outside the reach of the federal antitrust laws and to reduce health care costs by eliminating unnecessary duplication.⁸⁴

Under this proposal, a hospital contemplating a cooperative agreement would apply for a certificate of public advantage from the State Department of Health.⁸⁵ The Department of Health would review the application for the certificate of public advantage to determine the extent to which competition would be reduced, patients would be adversely affected, or other less restrictive arrangements could be implemented.⁸⁶ The decision of the Department of Health on the application for the certificate of public advantage would be final, although the hospital could proceed with the agreement notwithstanding the decision of the Department of Health.⁸⁷

Legislation was also introduced to provide for a clinical panel system.⁸⁸ This proposal included the establishment of the Academy of Health Care Science and Practice to adopt and disseminate clinical practice guidelines to assist health care providers in Indiana with medical decisionmaking.⁸⁹ Like the proposal by the Health Policy Commission, the clinical practice guidelines would be voluntary.⁹⁰ The clinical panel members would be persons with demonstrated knowledge and leadership selected by the Board of Directors of the Academy of Health Care Science and Practice.⁹¹

In terms of the Health Policy Commission's recommendations for the state's Medicaid program, the implementation of a coordinated care system was also discussed in the Indiana General Assembly. In 1987,

16-10-9-1). *See also* S.B. 232, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 16-10-9-1); H.B. 1921, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 16-10-9-4).

84. Amberg-Vajdic, *supra* note 82, at 11A.

85. H.B. 1800, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 16-10-9-5). *See also* S.B. 232, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 16-10-9-5); H.B. 1921, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 16-10-9-5).

86. H.B. 1800, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 16-10-9-7(c)). *See also* S.B. 232, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 16-10-9-7(c)); H.B. 1921, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 16-10-9-7(c)).

87. H.B. 1800, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 16-10-9-7(d), (e)). *See also* S.B. 232, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 16-10-9-7(d), (e)); H.B. 1921, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 16-10-9-7(d), (e)).

88. H.B. 1921, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE 16-47).

89. *Id.* (adding IND. CODE §§ 16-47-2-1, -2).

90. *Id.* (adding IND. CODE § 16-47-3-2).

91. *Id.* (adding IND. CODE § 16-47-3-5).

the Indiana legislature passed a statute allowing Medicaid recipients to receive care from a managed care provider.⁹² Unfortunately, this statute has not been utilized. In order to implement a primary care case management system under the statute, the state must seek a waiver from the requirements of the federal Medicaid program.⁹³ The legislature is considering seeking such a waiver, and a system of contracting with a network of managed care providers has been proposed.

Under the proposed network system, a Medicaid recipient would select a primary care physician who is a member of the Medicaid network.⁹⁴ If the recipient failed to specify a primary care physician, the Office of Medicaid Policy and Planning would assign the recipient to a primary care giver.⁹⁵ The recipient could not receive care from any other provider unless the recipient's primary care physician made a referral to another provider in the network or treatment was rendered in an emergency.⁹⁶

The network system would also include a critical care network of health care providers.⁹⁷ Patients to be seen by providers in the critical care network would include those with catastrophic,⁹⁸ chronic,⁹⁹ or ter-

92. IND. CODE §§ 12-15-12-1 to -11 (Supp. 1992) (formerly IND. CODE § 12-1-7-16.1).

93. 42 U.S.C. § 1396n(b)(1) (1988); IND. CODE § 12-15-12-11 (Supp. 1992). To obtain a waiver, the governor, state cabinet members responsible for state Medicaid agency activities, or the Director of the state Medicaid program must submit a request to the Health Care Financing Administration (HCFA). See 42 C.F.R. § 431.55 (1992); 3 Medicare & Medicaid Guide (CCH) ¶ 14,625 (1992). President Clinton recently issued an immediate order limiting the requests that HCFA can demand from a state seeking a waiver so that the states can have more freedom to provide alternative systems in administering their Medicaid programs. Gilbert A. Lewthwaite, *President Grants Governors Freedom to Adapt Medicaid*, INDIANAPOLIS STAR, Feb. 2, 1993, at 1-2. In response, HCFA plans to develop a list of standard initiatives that will receive automatic approval. *Clinton's Short-Term Initiatives*, HEALTHSPAN, March 1993, at 15, 16.

94. S.B. 232, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 12-15-11-8); H.B. 1921, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 12-15-11-8).

95. S.B. 232, 108th Gen. Assembly, 1st Reg. Sess. (1993) (amending IND. CODE § 12-15-12-1); H.B. 1921, 108th Gen. Assembly, 1st Reg. Sess. (1993) (amending IND. CODE § 12-15-12-4).

96. H.B. 1921, 108th Gen. Assembly, 1st Reg. Sess. (1993) (amending IND. CODE § 12-15-12-5).

97. *Id.* (adding IND. CODE 12-15-37).

98. Catastrophic illnesses include: (1) burns on more than 50% of the body; (2) premature birth; (3) low birthweight; (4) malignancy requiring chemical or radiation therapy; and (5) medical diagnosis or medical condition with projected treatment costs of more than \$150,000 in a 12-month period. *Id.* (adding IND. CODE § 12-15-37-1).

99. Chronic illnesses include: (1) severe neuromuscular disease; (2) end stage renal disease with dialysis when care is not covered by the Medicare program; (3) an organ

minal illnesses. A medical panel would be created jointly by the Office of Medicaid Policy and Planning and the State Department of Health that would provide advice concerning when a Medicaid patient with a critical care diagnosis would no longer be eligible for care within the network.¹⁰⁰

The proposed Medicaid network system could also prevent the recurrence of the issues raised in the *Tioga Pines* case because nursing facility services would be reimbursed prospectively in a manner that recognizes the costs of complying with federal statutes that provide the requirements for services in nursing facilities.¹⁰¹

Another drastic change for our health care system was presented in House Bill 1273, which was submitted this session by Representative Charlie Brown.¹⁰² This bill provided that any health insurance contract entered into after December 1996 would be unenforceable.¹⁰³ In the place of traditional health insurance, the bill created the Indiana Health Insurance Plan.¹⁰⁴ The Plan was designed "to provide insurance against the cost of health care services on uniform terms and conditions available to all residents of Indiana."¹⁰⁵ This attempt to provide universal health care in Indiana came to a halt when House Bill 1273 failed to make it out of the Senate Planning and Public Services Committee.

Unfortunately, at this time, the legislative process has come to a standstill.¹⁰⁶ Governor Bayh's attempt to include a one percent tax on hospital gross revenues forced a division in the legislature that could not be remedied before the legislative term was complete.¹⁰⁷ How, and

transplant for an individual for whom it is necessary to have a transplant within 30 days or who has had a transplant in the last two years; (4) cirrhosis of the liver; (5) severe insulin dependent diabetes; (6) end stage cardiomyopathy; (7) end stage chronic obstructive pulmonary disease; (8) hemophilia or a related disorder; (9) severe autoimmune deficiency; (10) severe cystic fibrosis; (11) severe polycystic kidney; (12) ventilator dependency with little or no likelihood of returning to normal respiratory function; and (13) illness that costs more than \$250,000 in a year to treat. *Id.* (adding IND. CODE § 12-15-37-2).

100. *Id.* (adding IND. CODE § 12-15-37-11(a)(2)). See also Health Policy Report, *supra* note 2, at 21-13.

101. S.B. 232, 108th Gen. Assembly, 1st Reg. Sess. (1993) (amending IND. CODE § 12-15-14-2); H.B. 1921, 108th Gen. Assembly, 1st Reg. Sess. (1993) (amending IND. CODE § 12-15-14-2).

102. H.B. 1273, 108th Gen. Assembly, 1st Reg. Sess. (1993).

103. *Id.* (adding IND. CODE § 27-12-10-4).

104. *Id.* (adding IND. CODE § 27-12-5-1).

105. *Id.* (adding IND. CODE § 27-12-5-2).

106. Nancy J. Winkley, *Medicaid Settlement Will Be Centerpiece of Special Session* INDIANAPOLIS STAR, May 2, 1993, at B1; Nancy J. Winkley, *State Lawmakers Fail to Avert Special Session*, INDIANAPOLIS STAR, April 30, 1993, at A1.

107. See S.B. 232, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE 12-15-39). This tax would be imposed on the gross revenues of all hospitals, regardless

when, the health reform issues raised this term will be resolved is anyone's guess. The state has not moved much further in its struggle to provide quality health care services to its citizens: we have ventured, but we have not gained. As long as the need for health care services is examined solely through the political process, our state cannot pull free from the patchwork-type approach that is now in place.

IV. A LOOK TOWARD THE FUTURE

The proposals for health care reform are confusing and provide little satisfaction when examined on their face. It is apparent, however, that in order to provide health care benefits for the residents of our state, the legislature must examine proposals to provide for a complete renovation of our state's health care system. Any change must consider cost, access, and the economic consequences inherent in the manipulation of consumer behavior.

Currently, the legislature is faced with the challenge of halting the increase in Medicaid expenditures while continuing to provide access to health care for those whose incomes are below the poverty level. This task includes eliminating the provision of duplicitous services through programs such as the HCI program and diverting those funds elsewhere. It also includes nurturing programs that provide benefits to persons who would not have access under any program, such as the program for children with special health care needs.

Many holes exist in our current system. Yet, without a clear vision of a health care system that is tailored to an accurate profile of the health care needs of our state, the dilemma will continue. Currently, multiple pieces of legislation have been introduced that propose change. The problem is that, with so many proposals, the residents of Indiana may again be left with a fragmented health care system.

The implementation of change requires the consideration of not only the legal ramifications and administrative burdens that are inherent in these proposals, but an economic and sociologic analysis of the proposed

of whether a hospital provides care to Medicaid recipients. The purpose of the tax is to provide a mechanism through which the state would receive additional federal matching funds. See Medicaid Program; Limitations on Provider-Related Donations and Health-Care Related Taxes; Limitations on Payments to Disproportionate Share Hospitals, 57 Fed. Reg. 55118 (1992) (to be codified at 42 C.F.R. pts. 433, 447). See also Nancy J. Winkley, *Democrats Rip GOP Alternatives to Hospital Tax*, INDIANAPOLIS STAR, April 27, 1993, at B1; Nancy J. Winkley, *Senate GOP Seeking Alternatives to Bayh's Medicaid Hospital Tax*, INDIANAPOLIS STAR, April 22, 1993, at B3; Nancy J. Winkley, *Bayh Losing His Support for Plan to Tax Hospitals*, INDIANAPOLIS STAR, April 16, 1993, at A1; Nancy J. Winkley, *Medicaid Fight Looms This Week: Hospital Tax Spurs Name-Calling, Anger*, INDIANAPOLIS STAR, April 12, 1993, at D1; Eric B. Schock, *Hospital Profit Figures Contradict Bayh's Claims*, INDIANAPOLIS STAR, April 8, 1993, at A1.

program as a whole. This kind of coordinated change cannot take place when different people are considering different portions of the health care program in different locations. The legislature needs to consider the bills proposed as a whole and discuss the effects of change in terms of a complete reform package. Until this occurs, we cannot formulate a clear vision of what we are trying to create, and we can never hope to be the laboratory for change that will provide the care our residents need, and perhaps, provide a model for other states.

Survey of Recent Developments in Medical Malpractice Law

THOMAS R. RUGE*

RHONDA L. FULLER**

The Indiana Court of Appeals and the Indiana Supreme Court addressed a number of medical malpractice issues during the survey period. There was little activity, however, in either the Indiana Legislature or the United States Court of Appeals for the Seventh Circuit during the survey period. Six categories of cases decided by the Indiana Court of Appeals and the Indiana Supreme Court will be examined in this Article: (1) cases in which applicability of the Medical Malpractice Act¹ is in question, (2) cases involving the issue of informed consent, (3) the case that discarded the modified locality rule, (4) cases involving the doctrine of continuing wrong and the statute of limitations, (5) cases addressing procedural matters, and (6) cases regarding proof of proximate cause in medical malpractice cases. This Article will summarize those cases and provide a more extended discussion and analysis of proof of proximate cause in Indiana, as well as how the law on causation in negligence cases, in general, relates to proof of proximate cause in medical malpractice cases.²

I. SUMMARY OF MEDICAL MALPRACTICE DECISIONS IN 1992

A. Cases in Which Applicability of the Act Is in Question

In *Miller v. Terre Haute Regional Hospital*,³ a suit for wrongful death, the Indiana Supreme Court confirmed that the filing of a proposed

* Partner, Lewis & Kappes, Indianapolis, Indiana; B.A., 1971, Indiana University—Bloomington; J.D., 1976, Valparaiso University School of Law.

** Associate, Lewis & Kappes, Indianapolis, Indiana; B.A., 1988, Indiana University—Bloomington; J.D., 1992, Indiana University School of Law—Indianapolis.

1. See IND. CODE §§ 16-9.5-1-1 to -10-5 (1988 & Supp. 1992).

2. Three important cases for medical malpractice practitioners are not within the scope of this Article. For a discussion of the Federal Emergency Medical Treatment and Active Labor Act and preemption, see *HCA Health Servs. of Ind., Inc. v. Gregory*, 596 N.E.2d 974 (Ind. Ct. App. 1992), which appears to conflict with *Power v. Arlington*, 800 F. Supp. 1384 (E.D. Va. 1992). See also *Reid v. Indianapolis Osteopathic Medical Hosp., Inc.*, 709 F. Supp. 853 (S.D. Ind. 1989); J. Michael Grubbs, *Health Law Update*, 23 IND. L. REV. 391, 391-406 (1990). For a discussion of limits on discovery of incident reports as being subject to the peer review privilege, see *Community Hosps. of Indianapolis, Inc. v. Medtronic, Inc.*, 594 N.E.2d 448 (Ind. Ct. App. 1992). For recognition of pre-conception torts, see *Yeager v. Bloomington Obstetrics and Gynecology, Inc.*, 585 N.E.2d 696 (Ind. Ct. App. 1992).

3. 603 N.E.2d 861 (Ind. 1992).

complaint against a health care provider with the Indiana Department of Insurance tolls the statute of limitations until the parties are informed that the provider was not qualified under the Act at the time of the alleged malpractice. The court held that "upon such notice [that the provider was not qualified], the statute of limitations begins to run again and the claimant must file an action in court or risk being time barred."⁴ This rule of law was clearly enunciated in *Guinn v. Light*.⁵ In *Guinn*, the court declared the new procedure regarding the effect of filing a proposed complaint with the Department upon the medical malpractice statute of limitations to be prospective and exempted the plaintiff Guinn from its application. The court found Guinn's filing to have been made timely, stating, "we will not hold Guinn accountable for failing to follow procedure where the proper procedure was unsettled."⁶

The procedural facts in *Miller* are substantially similar to those in *Guinn*. Miller's son died at Terre Haute Regional Hospital on November 21, 1986. Miller filed a proposed complaint against the hospital with the Department on November 18, 1988. Thereafter, the Department sent a letter indicating that the hospital was not a qualified health care provider under the Act.⁷ Miller received a copy of the letter on November 29, 1988.

On December 20, 1988, Miller filed a complaint against the hospital in the Vigo Circuit Court. The circuit court granted summary judgment in favor of the hospital because plaintiff's action was time barred. The court of appeals, rigidly followed *Guinn* and affirmed, holding that the two-year limitations period was tolled three days before its expiration.⁸ Miller failed to file his complaint within the three days after being notified that the hospital was not a qualified provider.⁹ Therefore, the court held that Miller's action was not timely commenced.¹⁰

The supreme court noted that the court of appeals' calculation was correct for factual situations arising after *Guinn*. However, Miller filed his complaints in 1988, before *Guinn* was decided. "Thus, like Guinn, Miller was unaware of the proper procedure to follow after a determination that a health care provider is not qualified under the Act. Application of the new rule announced in *Guinn* to a plaintiff in Miller's position would be patently unfair."¹¹ Thus, the court vacated the court

4. *Id.* at 863 (citing *Guinn v. Light*, 558 N.E.2d 821, 824 (Ind. 1990)).

5. 558 N.E.2d 821 (Ind. 1990).

6. *Id.* at 824.

7. See IND. CODE § 16-9.5-1-5 (Supp. 1992).

8. *Miller*, 603 N.E.2d at 862.

9. *Id.* at 863.

10. *Id.*

11. *Id.*

of appeals' decision and reversed the circuit court's entry of summary judgment.¹²

In *Van Sice v. Sentany*,¹³ the court was faced with the issue of whether the plaintiff's allegations of the intentional torts of fraud and battery removed his complaint from the requirements of the Act. This case raised the question of the extent to which allegations of intentional torts against qualified health care providers lie within the scope of the Act. Dr. Sentany performed an operation on Van Sice to treat a tumor in his finger. Van Sice alleged fraud and misrepresentation in that the recommended course of treatment involved unnecessary surgery. Van Sice also alleged battery in that the doctor did not fully inform him about the course of treatment.

The court determined that the substance of the plaintiff's allegations of fraud and battery were actually claims for malpractice.¹⁴ The court noted that to maintain his claim of fraud, the plaintiff would first have to prove that the course of treatment was improper. The question of whether a given course of treatment is medically proper "is the quintessence of a malpractice case."¹⁵ Regarding the plaintiff's allegation of battery, because Dr. Sentany failed to fully disclose the inherent risks of, and alternatives to, the course of treatment, the court reiterated that "acts which constitute a breach of the duties to disclose information and obtain informed consent . . . are malpractice."¹⁶ Therefore, the court held plaintiff's complaint was within the scope of the Act.¹⁷

In *Collins v. Covenant Mutual Insurance Co.*,¹⁸ the Indiana Court of Appeals was presented with the issue of insurance coverage for acts in which there was a question as to whether the alleged acts were claims for intentional tort or medical malpractice.¹⁹ The plaintiff, Covenant, was the insurer of Dr. Thakkar, whom Collins had filed suit against for wrongful abortion, assault and battery, and intentional infliction of emotional distress.²⁰ Covenant brought an action against Thakkar, Col-

12. *Id.* at 864.

13. 595 N.E.2d 264 (Ind. Ct. App. 1992).

14. *Id.* at 267.

15. *Id.*

16. *Id.* (quoting *Boruff v. Jesseph*, 576 N.E.2d 1297, 1299 (Ind. Ct. App. 1991)).

17. *Id.*

18. 604 N.E.2d 1190 (Ind. Ct. App. 1992).

19. In *Collins v. Thakkar*, 552 N.E.2d 507 (Ind. Ct. App. 1990), the court concluded that Collins' claims of intentional tort were not torts based on health care or professional services rendered by a health care provider and, therefore, Collins was not required to submit those claims to a medical review panel before bringing her action against Thakkar. Collins later filed a second suit against Thakkar alleging that his acts constituted medical malpractice. Collins' two actions against Thakkar were consolidated and venued to the Shelby Circuit Court, where the case is pending. *Covenant*, 604 N.E.2d at 1192.

20. *Covenant*, 604 N.E.2d at 1192.

lins, and several of Thakkar's other patients who had filed similar actions against him, seeking a declaratory judgment in regard to its obligations for Thakkar's acts under Thakkar's professional liability insurance policy.²¹ Covenant moved for summary judgment against Collins and the trial court granted it. The trial court concluded:

Plaintiff's motion for Summary Judgment is hereby GRANTED, as there are no genuine issues of material fact. Plaintiff CMIC is entitled to judgment as to Count 1 of its declaratory judgment complaint, as a matter of law. A review of the uncontested factual basis of Defendant Collins' claims against defendant Thakkar, a review of the terms of the subject insurance policy issued to defendant Thakkar by CMIC and its predecessor, and a review of *Collins v. Thakkar*, 552 N.E.2d 507 (Ind. App. 1990), *transfer denied*, ___N.E.2d ___(Ind. 1990), decided on identical facts as presented by this record, compel the conclusion that there is no coverage under the subject insurance policy for the claims of defendant Collins against defendant Thakkar. Therefore, defendant Collins has no right to or interest in any proceeds of the subject insurance policy.²²

In deciding whether the trial court properly entered summary judgment in Covenant's favor, the court of appeals stated that its conclusion in *Collins v. Thakkar*²³ "in no way prevented her from pursuing a malpractice action against Thakkar."²⁴ The court further stated that in *Collins v. Thakkar* they had not concluded "that the facts on which those claims were based could not also support malpractice allegations."²⁵

Covenant's insurance policy provided, in pertinent part, that Covenant would "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages arising out of individual professional liability; personal injury caused by error, omission, or negligence in *providing health care services*, rendered or which should have been rendered by the insured."²⁶ Covenant, in moving for summary judgment, claimed that Thakkar's actions, being intentional torts, did not constitute the rendition of health care services and, therefore, were not covered by his policy. Collins maintained that her complaint against Thakkar contained four separate allegations of negligence in the rendering

21. *Id.*

22. *Id.* at 1193 (quoting trial court record at 186-87).

23. 552 N.E.2d 507 (Ind. Ct. App. 1990).

24. *Covenant*, 604 N.E.2d at 1195.

25. *Id.*

26. *Id.* at 1194 (quoting trial court record at 23) (emphasis in court's opinion, but not in original).

of health care services: "(1) that Thakkar entered into a sexual relationship with her while she was his patient, (2) that Thakkar impregnated her while she was his patient, (3) that Thakkar told her she was not pregnant when she was, and (4) that Thakkar mistreated her after the exam and failed to properly treat the wound he inflicted."²⁷

The court disagreed with Collins' assertion that her first two claims against Thakkar were malpractice. After examining decisions of other courts which have addressed the issue of a physician's sexual conduct with a patient,²⁸ the court concluded that Thakkar's sexual relationship with Collins "cannot be characterized as the provision of health care services and is therefore not within the scope of coverage of his insurance policy with Covenant."²⁹

In regard to Collins' other two allegations, that "Thakkar misinformed her of the results of a medical procedure and that he negligently performed that medical procedure,"³⁰ the court found that those claims could "arguably be construed as claims for 'personal injury caused by error, omission or negligence in providing health care services' as covered by Covenant's insurance policy."³¹ The court stated: "As the evidence submitted by Covenant demonstrates that Collins alleged that Thakkar negligently provided health care services to her, causing her personal

27. *Id.* at 1195.

28. The court looked to other jurisdictions that had considered whether a physician's sexual conduct with a patient was actionable as medical malpractice. "The general rule is that a physician's sexual relationship with a patient does not constitute rendition of health care services, and is not actionable as medical malpractice." *Id.* at 1196 (citing *Standlee v. St. Paul Fire & Marine Ins. Co.*, 693 P.2d 1101 (Idaho Ct. App. 1984)). The court found that a distinction has been made between the therapist-patient relationship and a physician-patient relationship, because the former offers a course of treatment and counselling predicated upon handling the transference phenomenon. Transference occurs when patients reveal their innermost feelings and thoughts to the therapist, develop intense, intimate relationship with the therapist and often "falls in love" with the therapist. The therapist must encourage the patient to express the transferred feelings, while rejecting any erotic advances. This may be difficult to do and presents an "occupational risk." The therapist in this situation has a duty, imposed by professional standards of care as well as by ethical standards of behavior, to refrain from a personal relationship with the patient, whether during or outside therapy sessions. *Id.* (quoting *St. Paul Fire & Marine Ins. Co. v. Love*, 459 N.W.2d 698, 701 (Minn. 1990)).

So absent a patient-therapist relationship, in which the risk of mishandling the transference phenomenon is an occupational hazard generally within the scope of professional liability insurance coverage, a physician's sexual activity with a patient does not give rise to an actionable claim of medical malpractice and does not constitute the provision of health care services.

Id. at 1196-97 (citations omitted).

29. *Id.* at 1197.

30. *Id.*

31. *Id.* (quoting trial court record at 23).

injury, Covenant has failed to establish that it is entitled to judgment as a matter of law."³² The court of appeals held that the trial court erred when it relied on the appeals decision in *Collins v. Thakkar*³³ to enter summary judgment against Collins on her negligence claims.³⁴

In *St. Anthony Medical Center v. Smith*,³⁵ the Indiana Court of Appeals held that the trial court had subject matter jurisdiction over plaintiff's medical malpractice claim after the medical review panel rendered its opinion and the plaintiff filed a motion for reinstatement.³⁶ On July 8, 1987, Smith filed her medical malpractice complaint in the Lake Circuit Court.³⁷ On July 9, 1987, Smith filed an identical complaint with the Department. On February 23, 1989, the medical review panel concluded that St. Anthony Medical Center (SAMC) failed to comply with the appropriate standard of care.³⁸ On May 8, 1989, Smith filed a motion to reinstate her complaint with the trial court. Thereafter, on August 29, 1989, the defendant, SAMC, filed a motion to dismiss for lack of subject matter jurisdiction.

The circuit court denied defendant's motion to dismiss and rendered judgment for plaintiff, although reducing the jury's award of damages to the amount allowed by the Malpractice Act.³⁹ On appeal, SAMC argued that the trial court did not have subject matter jurisdiction over Smith's claim because it did not meet the procedural requirements of the Act. Indiana Code section 16-9.5-9-2 provides:

Except as provided in subsection (b) and in section 3.5 of this chapter, no action against a health care provider may be commenced in any court of this state before the claimant's proposed complaint has been presented to a medical review panel established pursuant to this chapter and an opinion is rendered by the panel.⁴⁰

Smith's original complaint was filed in circuit court before the medical review panel had issued its opinion. Because the plaintiff filed a motion for reinstatement after the panel had rendered its opinion, the court of appeals held that the trial court did have subject matter jurisdiction over plaintiff's claim.⁴¹

32. *Id.* at 1197-98.

33. 552 N.E.2d 507 (Ind. Ct. App. 1990).

34. *Covenant*, 604 N.E.2d at 1198.

35. 592 N.E.2d 732 (Ind. Ct. App. 1992).

36. *Id.* at 736-37.

37. The case was assigned to Jasper Circuit Court on Sept. 11, 1989.

38. *St. Anthony*, 592 N.E.2d at 735.

39. *Id.* For applicable liability limits see IND. CODE § 16-9.5-2-2 (Supp. 1992).

40. IND. CODE § 16-9.5-9-2 (1988).

41. *St. Anthony*, 592 N.E.2d at 736. Had the defendant filed its motion to dismiss

B. Allegations of Lack of Informed Consent in Medical Malpractice Cases

In *Tudder v. Torres*,⁴² the Indiana Court of Appeals held that the trial court did not err in admitting into evidence the medical review panel's opinion "which concluded that (1) the evidence did not support the allegations of failure to meet the applicable standard of care, and (2) there did not exist a material issue of fact, not requiring expert opinion, which needed to be considered by the fact finder."⁴³ After undergoing gastric bypass surgery in order to lose weight, the plaintiffs, Tudder and Gibson, developed complications. Alleging that the defendants were negligent for performing surgery without their informed consent, the plaintiffs filed a proposed complaint with the Insurance Department.⁴⁴ During trial, the panel's opinion was admitted into evidence over the plaintiffs' objections. Judgment was entered on a jury verdict in favor of the defendants.

On appeal, the plaintiffs argued that the panel exceeded its statutory authority by resolving a conflict in the evidence related to whether the plaintiffs were advised of the risks and possible complications involved with the surgery.⁴⁵ The plaintiffs argued that the panel should have rendered the opinion "that there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury."⁴⁶ The court, after examining the statutory language of the Act and analyzing the court's reasoning in *Dickey v. Long*,⁴⁷ concluded that the panel's opinion was properly introduced into evidence.⁴⁸

One of two informed consent cases decided on October 29, 1992, by the Indiana Supreme Court was *Culbertson v. Mernitz*.⁴⁹ After a physical examination, Dr. Mernitz recommended that the plaintiff undergo a surgical procedure known as the Marshall Marchette Krantz (MMK) procedure. Dr. Mernitz contended that prior to the surgery he

before the panel rendered its opinion, when the trial court did lack subject matter jurisdiction over the complaint, the court would have been required to dismiss the cause of action without prejudice, leaving Smith free to refile her complaint after the panel rendered an opinion. *Id.*

42. 591 N.E.2d 656 (Ind. Ct. App. 1992).

43. *Id.* at 657.

44. *Id.*

45. See IND. CODE § 16-9.5-9-7 (1988).

46. *Tudder*, 591 N.E.2d at 657.

47. 575 N.E.2d 339 (Ind. Ct. App. 1991), *opinion adopted by* *Dickey v. Long*, 591 N.E.2d 1010 (Ind. 1992). In *Dickey*, the panel resolved a question of fact which did not require an expert opinion in issuing its opinion. See *infra* notes 123-32 and accompanying text.

48. *Tudder*, 591 N.E.2d at 658.

49. 602 N.E.2d 98 (Ind. 1992).

advised the plaintiff of (1) the general risks of any surgery; (2) the risk that the bladder suspension procedure could fail and she would be unable to void;⁵⁰ and (3) that the plaintiff would have severe vaginal discharge for two weeks, and a milder discharge for six weeks, after the surgery. The plaintiff, on the other hand, denied that any of these risks were explained to her. Both parties, however, agreed that Dr. Mernitz did not advise the plaintiff of the risk that the cervix could become adhered to the wall of the vagina.

The plaintiff filed a proposed complaint with the Department alleging four counts, one of which was "that Dr. Mernitz failed to inform Mrs. Culbertson of the alternatives to surgery and the inherent risks and complications of surgery."⁵¹ The medical review panel opinion concluded:

[Dr. Mernitz] did not advise [Mrs. Culbertson] of the complication of cervical adhesion to the vagina; the Panel further determines that such non-disclosure does not constitute a failure to comply with the appropriate standard of care, as such complication is not considered a risk of such surgery requiring disclosure to the patient.⁵²

The plaintiff proceeded by filing an action against Dr. Mernitz. Relying on the expert opinion issued by the medical review panel, Dr. Mernitz moved for summary judgment. The trial court granted Dr. Mernitz's motion for summary judgment on all four counts.⁵³ The plaintiff appealed on the informed consent issue, arguing "that expert medical testimony is not necessary to make a *prima facie* case of lack of informed consent because the 'prudent patient' standard is the law in this State and such standard does not contemplate the necessity of expert medical testimony."⁵⁴ The court of appeals agreed with the plaintiff and held that the trial court erred in granting defendant's motion for summary judgment in regard to the issue of informed consent because an issue of fact remained which did not require expert testimony in regard to the materiality of the issue.⁵⁵

The Indiana Supreme Court vacated the court of appeals' opinion and affirmed the trial court's grant of summary judgment in favor of Dr. Mernitz.⁵⁶ The supreme court was called upon to determine the role

50. To eliminate solid or liquid waste from the body. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1321 (1984).

51. *Culbertson*, 602 N.E.2d at 99.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 104.

to be played by expert medical opinion in resolving claims of medical malpractice premised upon a failure to obtain an informed consent.⁵⁷ After analyzing the prudent physician standard versus the prudent patient standard, and the rationale for each, the court determined that the law in Indiana remains unchanged and that the prudent physician standard governs medical malpractice cases involving informed consent.⁵⁸ Accordingly, the supreme court held that "except in those cases where deviation from the standard of care is a matter commonly known by lay persons expert medical testimony is necessary to establish whether a physician has or has not complied with the standard of a reasonably prudent physician."⁵⁹ Because the plaintiff failed to provide expert medical testimony to refute the unanimous opinion issued by the panel, the court held her claim did not present "a material issue of fact as to what a reasonably prudent physician would have discussed during this proposed surgery."⁶⁰ The supreme court affirmed the trial court's entry of summary judgment against the plaintiff.⁶¹

On October 29, 1992, the Indiana Supreme Court was faced with another case involving an informed consent issue in *Griffith v. Jones*.⁶² However, before reaching the issue of informed consent, the court raised, sua sponte, the issue of whether the trial court exceeded its authority in acting upon a motion for preliminary determination of law. The issue of informed consent raised by the parties was not considered because of the way the court disposed of case, but the court did refer the parties to its opinion in *Culbertson*.⁶³

In *Griffith*, the plaintiff filed a motion for preliminary determination of law with the court before the panel could render its opinion. The plaintiff requested that "the court order the medical review panel to find that there were material issues of fact not requiring expert opinion bearing on liability for consideration by the court or jury as regards

57. For a historical discussion of Indiana jurisprudence regarding informed consent, see *id.* at 101-03.

58. *Id.* at 104.

59. *Id.*

60. *Id.*

61. *Id.*

62. 602 N.E.2d 107 (Ind. 1992). Jones underwent a femoral angiography performed by Dr. Griffith. Jones was not advised that there was a risk of death associated with the procedure. After the surgery was performed, Jones suffered anaphylactic shock brought on by a reaction to the radiographic contrast dye used during the procedure. Epinephrine was administered intermuscularly, although it should have been administered intravenously. Jones could not be resuscitated and died. Jones' personal representative filed a proposed complaint with the Department. Part of her allegations focused on Dr. Griffith's failure to obtain the informed consent of Jones. *Id.* at 108-09.

63. See *supra* notes 49-61 and accompanying text.

the issue of informed consent.”⁶⁴ She also requested the court to construe the term “a factor”⁶⁵ and to enter partial summary judgment in her favor on the issue of informed consent.⁶⁶ The trial court issued certain findings of fact and conclusions of law as preliminary determinations.⁶⁷ Dr. Griffith appealed from this order. “The court of appeals affirmed the trial court in its entirety, and held that the weight of authority in Indiana supports the trial court’s determination that the ‘prudent patient standard of care in informed consent cases . . . has been adopted in Indiana.’”⁶⁸ Additionally, the court of appeals affirmed the trial court’s instructions to the panel, as well as its denial of the motion for partial summary judgment.⁶⁹

The Indiana Supreme Court raised sua sponte the issue of the trial court’s authority to preliminarily determine the issues requested by plaintiff. The court noted that section 16-9.5-10-1 of the Indiana Code:

grants to a court having jurisdiction over the subject matter and the parties to a proposed complaint filed with the commissioner the power to “preliminarily determine any affirmative defense or issue of law or fact that may be preliminarily determined under the Indiana Rules of Procedure; or (2) compel discovery in accordance with the Indiana Rules of Procedure; or (3) both.”⁷⁰

In examining the “interplay between the legislature’s intended informal functioning of the panel and its empowering of the trial court to preliminarily determine certain matters,”⁷¹ the court found that “the grant of power to the trial court to preliminarily determine matters is to be narrowly construed” as governed by the Indiana Trial Rules.⁷² The court held that Indiana Code section 16-9.5-10-1 “specifically limits the power of the trial courts of this State to preliminarily determining affirmative defenses under Trial Rules, deciding issues of law or fact that may be

64. *Griffith*, 602 N.E.2d at 109. See IND. CODE § 16-9.5-9-7(c) (1988).

65. See IND. CODE § 16-9.5-9-7(d) (1988) (“The conduct complained of was or was not a *factor* of the resultant damages.”) (emphasis added).

66. *Griffith*, 602 N.E.2d at 109.

67. The court’s pertinent findings of fact and conclusions of law were: (1) the “prudent patient” standard applied in informed consent cases, (2) the panel cannot render expert opinion regarding compliance with the prudent patient standard, (3) motion for partial summary judgment was denied but the panel was directed to find that there were material issues of fact not requiring expert opinion, (4) the phrase “a factor” lowers the traditional threshold of causation. *Id.*

68. *Id.* (quoting *Griffith v. Jones*, 577 N.E.2d 258, 264 (Ind. Ct. App. 1991)).

69. *Id.*

70. *Id.* at 110 (quoting IND. CODE § 16-9.5-10-1 (1988)).

71. *Id.*

72. *Id.*

preliminarily determined under Trial Rule 12(D), and compelling discovery pursuant to Trial Rules 26 through 37, inclusively.”⁷³

The court further held that “the trial courts of this State do not have jurisdiction to instruct the medical review panel concerning definitions of terms and phrases used in the Medical Malpractice Act, the evidence that it may consider in reaching its opinion, or the form or substance of its opinion.”⁷⁴ The court determined that the medical review panel “should be allowed to operate in the informal manner which was contemplated by the legislature.”⁷⁵ Accordingly, the court of appeals’ opinion was vacated and the trial court’s preliminary rulings were reversed because the Indiana Supreme Court held that the trial court exceeded its authority to preliminarily determine the law in this case.⁷⁶

C. *Abandonment of Indiana’s Modified Locality Rule*

In *Vergara ex rel. Vergara v. Doan*,⁷⁷ the Indiana Supreme Court abandoned the modified locality rule, finding “that the reasons for the Modified Locality Rule are no longer applicable in today’s society.”⁷⁸ The modified locality rule circumscribes the standard of care as: “that degree of care, skill and proficiency which is commonly exercised by ordinarily careful, skillful and prudent [physicians], at the time of the operation and *in similar localities*.”⁷⁹ The court noted that “the disparity between small town and urban medicine continues to lessen with advances in communication, transportation, and education, [and that] . . . widespread insurance coverage has provided patients with more choice of doctors and hospitals by reducing the financial constraints on the consumer in selecting caregivers.”⁸⁰

The Indiana Supreme Court adopted the following standard of care for medical malpractice: “A physician must exercise that degree of care, skill and proficiency exercised by reasonably careful, skillful, and prudent practitioners in the same class to which he belongs, acting under the

73. *Id.*

74. *Id.* at 111.

75. *Id.*

76. *Id.*

77. 593 N.E.2d 185 (Ind. 1992). Javier Vergara was born on May 31, 1979, in Decatur, Indiana. His parents claimed that negligence on the part of Dr. Doan during Javier’s delivery caused him severe and permanent injuries. The jury returned a verdict for Dr. Doan and plaintiffs appealed. The court of appeals affirmed the lower court and plaintiffs sought transfer to the Indiana Supreme Court, asking the court to abandon Indiana’s modified locality rule. *Id.* at 186.

78. *Id.* at 186.

79. *Id.*

80. *Id.* at 187.

same or similar circumstances.”⁸¹ The court further explained that “this standard uses locality as but one of the factors to be considered in determining whether the doctor acted reasonably. Other relevant considerations would include advances in the profession, availability of facilities, and whether the doctor is a specialist or general practitioner.”⁸²

D. The Doctrine of Continuing Wrong and the Statute of Limitations

Two cases were decided in 1992 by the Indiana Court of Appeals regarding the statute of limitations and the doctrine of continuing wrong in medical malpractice cases.⁸³ In *O’Neal v. Throop*,⁸⁴ O’Neal sought medical treatment from Dr. Throop for a knee injury on June 22, 1988. On June 30, 1988, Throop reattached O’Neal’s torn medial collateral ligament to the bone with a metallic staple. After the surgery Throop prescribed physical therapy. O’Neal sought therapy at Rehab Works on July 19, 1988, and continued therapy at Rehab Works through August 19, 1988. O’Neal’s progress was slow. On September 7, 1988, O’Neal saw Throop again and Throop concluded the staple had come loose. On September 8, 1988, O’Neal sought treatment from another orthopedic surgeon who purportedly told O’Neal that Throop had attached the staple incorrectly. In his complaint, O’Neal alleged that Dr. Throop provided negligent medical treatment for his knee and that Rehab Works negligently failed to inform Dr. Throop that O’Neal was making little progress in physical therapy.

O’Neal filed his proposed complaint with the Department on September 13, 1990, and filed a complaint in the Marion Superior Court on the same day. Defendants filed motions for summary judgment alleging that O’Neal’s actions were time-barred. After a hearing, the trial court granted defendants’ motions and dismissed O’Neal’s complaint.⁸⁵ Section 16-9.5-3-1 of the Indiana Code, which is a two-year statute of limitations, “has repeatedly been held to be an ‘occurrence’ rather than a ‘discovery’ statute.”⁸⁶ O’Neal argued on appeal that the defendant’s negligent medical care was a continuing wrong, and therefore, the statute of limitations did not begin to run on his claims until the

81. *Id.*

82. *Id.*

83. *O’Neal v. Throop*, 596 N.E.2d 984 (Ind. Ct. App. 1992); *Babcock v. Lafayette Home Hosp.*, 587 N.E.2d 1320 (Ind. Ct. App. 1992).

84. 596 N.E.2d 984 (Ind. Ct. App. 1992).

85. *Id.* at 986.

86. *Id.* (citing *Havens v. Ritchey*, 582 N.E.2d 792, 794 (Ind. 1991); *Babcock v. Lafayette Home Hosp.*, 587 N.E.2d 1320, 1323 (Ind. 1992); *Hospital Corp. of Am. v. Hilland*, 547 N.E.2d 869, 872 (Ind. Ct. App. 1989)).

conduct ceased. The court of appeals found that O'Neal's actions were time barred and affirmed the trial court's dismissal.⁸⁷

Even under the doctrine of continuing wrong, O'Neal's complaint was not timely. "The doctrine of continuing wrong is applicable when an entire course of conduct combines to produce an injury. Under the doctrine, the two-year statute of limitations does not begin to run until the wrongful course of conduct ceases."⁸⁸ Dr. Throop informed O'Neal about the loose staple in O'Neal's knee and recommended its removal on September 7, 1988. Therefore, the alleged wrong ceased on September 7, 1988, or at the latest, on September 8, 1988, when another doctor told O'Neal that the staple had been attached improperly. Therefore, the court held under the doctrine of continuing wrong O'Neal had until September 8, 1990, to file his proposed complaint.⁸⁹

O'Neal also argued that Dr. Throop and Rehab Works were estopped from asserting the statute of limitations defense due to the doctrine of fraudulent concealment. The two-year statute of limitations does not apply under the doctrine of fraudulent concealment. Rather, "the plaintiff claiming fraudulent concealment has a duty to bring the action within a reasonable time after discovering the malpractice."⁹⁰ "[T]he plaintiff must exercise due diligence in bringing the claim."⁹¹ The court found that even if Throop fraudulently concealed the malpractice, O'Neal was not diligent in filing his claim.⁹² He waited more than two years after he learned that Dr. Throop may have attached the staple improperly. The court held that that delay was unreasonable as a matter of law.⁹³ The court also held that O'Neal's delay in filing against Rehab Works was also unreasonable as a matter of law in that the physician/patient relationship terminated, at the latest, on August 23, 1988, and he did not file his claim until September 13, 1990.⁹⁴

In *Babcock v. Lafayette Home Hospital, Women's Clinic*,⁹⁵ the Indiana Court of Appeals affirmed the trial court's grant of defendant's

87. *Id.* at 988.

88. *Id.* at 987.

89. *Id.* at 987-88.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 987.

94. *Id.*

95. 587 N.E.2d 1320 (Ind. Ct. App. 1992). On March 10, 1986, a hysterectomy was performed on Babcock at Lafayette Home Hospital. A second surgery was performed the next day because of complications arising from the first operation. Chest X-rays were taken on March 12, which showed an unexplained pocket of air in Babcock's body cavity. She was later discharged on March 17, 1986. Babcock was examined in the doctor's office on April 14, 1986, where she was informed that she was recovering well, but might

motions for summary judgment based on the expiration of the two-year statute of limitations.⁹⁶ Under the doctrine of continuing wrong, "the conduct that produces the injury must be of a continuing nature, not an isolated event."⁹⁷ The court found that leaving a surgical sponge in Babcock's body cavity and misreading a chest X-ray were isolated events and, therefore, the doctrine of continuing wrong did not apply.⁹⁸

Babcock argued that the doctrine of fraudulent concealment estopped the defendants from proffering the statute of limitations as a defense.⁹⁹ The court upheld the trial court's grant of summary judgment in regard to the issue of fraudulent concealment on two alternative grounds.¹⁰⁰ First, the physician-patient relationship was terminated, at the latest, in July of 1986. The relationship between the hospital and Babcock ended on March 17, 1986, the date of her discharge. Therefore, even if the doctrine of fraudulent concealment applied, the two-year statute of limitations had expired. Second, "Babcock did not use due diligence in initiating her action after discovering the alleged malpractice."¹⁰¹ The court stated that the plaintiff was not entitled to "two full years from the discovery of the alleged malpractice to file his or her claim."¹⁰² The court stated, "A plaintiff should have a reasonable time within which to commence an action after discovery of the malpractice."¹⁰³ Because Babcock waited until June 1, 1989, more than one year after learning of the damage and more than three years after the acts, to file her

continue to experience symptoms of an upset stomach and be unable to eat spicy foods. Both of which were normal circumstances following a hysterectomy. Approximately four to five months after the hysterectomy, Babcock began to feel "sick all the time." *Id.* at 1322. In May 1988, Babcock sought treatment for a backache from a chiropractor. The chiropractor informed Babcock that X-rays revealed an object may have been left in her body cavity from the hysterectomy. In September, 1988, Babcock consulted another doctor for treatment of a vaginal itch. She was later seen on December 13, 1988 by a hospital emergency room physician for the same problem. "At that time an X-ray revealed a ribbon-like opacity projected over the upper pelvic region." *Id.* Babcock was referred to another doctor who removed a sponge from Babcock's pelvis on January 17, 1989. Babcock filed her proposed complaint with the Department on June 1, 1989. *Id.*

96. *Id.* at 1323-25.

97. *Id.* at 1323.

98. *Id.*

99. Fraudulent concealment tolls the running of the statute of limitations until either the physician/patient relationship ends or the patient discovers the malpractice or learns information which, in the exercise of reasonable diligence, would lead to discovery of the malpractice. *Id.* at 1324.

100. *Id.* at 1324.

101. *Id.*

102. *Id.*

103. *Id.* (quoting *Ferrell v. Geisler*, 505 N.E.2d 137, 139 (Ind. Ct. App. 1987)).

proposed complaint with the Department, the court found that this delay was unreasonable as a matter of law.¹⁰⁴

E. Indiana Decisions Affecting Procedural Aspects of Medical Malpractice Cases

In *Surgical Associates, Inc. v. Zabolotney*,¹⁰⁵ the Indiana Court of Appeals determined that proposed members of a medical review panel are not required to answer interrogatories from one of the parties concerning their qualifications to serve on the panel. Plaintiff's counsel filed with the chairman of the panel a list of thirty-five interrogatories to be answered by panel nominees. The defendants objected, and the chairman petitioned the Whitley Circuit Court for the preliminary determination of an issue of law.

The circuit court ruled that the parties were entitled to submit questions to nominees, that the chairman had discretion to control the nature and number of questions, and that any charges by nominees were to be paid as other panel costs.¹⁰⁶ The court then certified the matter for interlocutory appeal.¹⁰⁷

The court of appeals noted that section 16-9.5-10-1 of the Indiana Code permits the trial court to compel discovery relevant to the subject matter of the pending claim. However, the court went on to note that no provision of the Act affords discovery procedures concerning potential members of the panel. The court emphasized the Act's legislative scheme was designed to secure a fair and acceptable panel. In addition, the court stated that the legislative intent to expedite malpractice panel review was clear. "[T]he time limits the Act seeks to invoke would normally be thwarted by the procedure [of requiring panelists to answer interrogatories] and substantial expense would be added to the proceeding if a number of panelists had to be surveyed."¹⁰⁸ The court also noted that a decision by a review panel is only *evidence* in a subsequent civil action and that the parties have the right to call any members of the panel as witnesses.¹⁰⁹ For these reasons, the court refused to require prospective members of the panel to answer interrogatories proposed by the parties concerning their qualifications to serve on the panel.

104. *Id.* at 1325.

105. 599 N.E.2d 614 (Ind. Ct. App. 1992).

106. *Id.* at 615.

107. *Id.*

108. *Id.* at 616.

109. See IND. CODE § 16-9.5-9-9 (1988).

In *Oelling v. Rao*,¹¹⁰ the Indiana Supreme Court held that the affidavit of the plaintiff's expert witness was insufficient to raise an issue of fact to prevent summary judgment.¹¹¹ The supreme court's holding affirmed the circuit court's grant of summary judgment for the defendants. The defendant moved for summary judgment and submitted the opinion of the medical review panel as support. The court found that the panel's opinion was sufficient to satisfy the defendant's burden of showing no genuine issue of material fact; and therefore, if the plaintiff could not show a breach of the standard of care, the defendants would be entitled to judgment as a matter of law.¹¹² Once the movant has satisfied its burden, the opponent must set forth specific facts showing that there is a genuine issue for trial.¹¹³ The Oellings attempted to do this by presenting an affidavit of an expert. "To refute the defendants' evidence, the affidavit needed to set out the applicable standard of care and a statement that the treatment in question fell below that standard."¹¹⁴ The court found that the affidavit of plaintiff's expert "stated only that *he* would have treated Mr. Oelling differently, not that Dr. Rao's treatment fell below the applicable standard."¹¹⁵

This case was decided on the same day as *Vergara ex rel. Vergara v. Doan*,¹¹⁶ which abandoned Indiana's modified locality rule. The court in *Oelling* stated that the new standard differed only slightly from the modified locality rule, which Indiana had been using and proof of the new standard still required expert testimony regarding what "other reasonable doctors similarly situated would have done under the circumstances."¹¹⁷ The expert's affidavit failed to set out any standard at all. Therefore, the court held it was "insufficient to raise a material issue of fact in regard to whether the defendants' conduct fell below that which was reasonable under the circumstances."¹¹⁸

In *Becker v. Plemmons*,¹¹⁹ the Indiana Court of Appeals decided that the trial court's refusal to allow the defendant Becker to have ex

110. 593 N.E.2d 189 (Ind. 1992). A patient brought a medical malpractice action against physicians, alleging that cardiac catheterization performed on the patient was unnecessary and resulted in the patient having to undergo cardiac surgery to correct the complications.

111. *Id.* at 190.

112. *Id.*; see IND. TRIAL R. 56(C) ("The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.")

113. *Oelling*, 593 N.E.2d at 190 (citing IND. TRIAL R. 56(E)).

114. *Id.* at 190 (citing *Marquis v. Battersby*, 443 N.E.2d 1202 (Ind. Ct. App. 1982)).

115. *Id.* at 190-91.

116. 593 N.E.2d 185 (Ind. 1992); see *supra* notes 77-82 and accompanying text.

117. *Oelling*, 593 N.E.2d at 191.

118. *Id.*

119. 598 N.E.2d 564 (Ind. Ct. App. 1992). Plemmons was admitted to Clark County

parte conferences with Plemmons' treating physicians was not reversible error. Although not in the record, Becker alleged that the trial court orally denied the motion on the basis of physician-patient privilege. The court of appeals addressed the issue as if the trial court did make such ruling. The court noted that when "a party-patient places a condition in issue, he waives the physician-patient privilege as to '. . . all matters causally or historically related to that condition, and information which would otherwise be protected from disclosure by the privilege then becomes subject to discovery.'" ¹²⁰

The court then analyzed the methods of discovery allowed in Indiana under Indiana Trial Rule 26(A)(1)-(5) in order to determine if the *ex parte* conference was an authorized method of discovery. Discovery methods set forth in Indiana Trial Rule 26(A)(1)-(5) include oral and written depositions, interrogatories, requests for production of documents, and requests for admissions. "Nowhere in our trial rules does it provide for informal *ex parte* conferences; hence, the trial court did not abuse its discretion in denying that Becker's motion for a protective order."¹²¹ The court indicated Becker could have used other authorized methods of discovery to obtain information from Plemmons' treating physicians. Thus, the court held that the trial court did not abuse its discretion in denying Becker's motion.¹²²

In *Dickey v. Long*,¹²³ the Indiana Supreme Court decided that a medical review panel's report was admissible when the panel determined a material issue of fact not requiring expert opinion. Dickey brought a medical malpractice action against an optometrist. The panel's opinion concluded that "the evidence does not support the conclusion that the defendant, James A. Long, II, O.D., failed to comply with the appropriate standard of care as charged in the Complaint."¹²⁴ After the panel issued its opinion, Dickey filed a complaint in Allen Superior Court.

Hospital for elective shoulder surgery on January 13, 1986. Dr. Karia, Dr. Jimenez and Becker, a certified registered nurse anesthetist, were to perform the anesthesia during the surgery. Becker, however was the only anesthetist present during Plemmons' surgery. The blood pressure and heart rate monitor was turned on at approximately 7:31 a.m. and the monitor began recording at 7:45 a.m. Sometime between 8:16 a.m. and 8:21 a.m., Plemmons had no recordable blood pressure or heart rate. Plemmons was in cardiac arrest. The code for cardiac arrest was not called until 8:30 a.m. Plemmons was eventually resuscitated and stabilized. Plemmons was later pronounced brain dead and his respirator was removed. He died on January 16, 1986. *Id.* at 566.

120. *Id.* at 569 (quoting *Owen v. Owen*, 563 N.E.2d 605, 608 (Ind. 1990)).

121. *Id.* at 569. Becker filed a pretrial motion for a protective order requesting the trial court to authorize *ex parte* conferences with the plaintiff's treating physicians.

122. *Id.*

123. 591 N.E.2d 1010 (Ind. 1992).

124. *Id.* at 1010.

Prior to trial, Dickey sought a motion in limine to exclude the panel's report from evidence. The motion was denied as was Dickey's objection during trial when the report was offered into evidence.

On appeal, Dickey argued that "the decision of the panel was inadmissible because it exceeded the panel's statutory authority in that one member of the panel allegedly conceded that his decision was based on a determination of a material issue of fact that did not require expert opinion."¹²⁵ Dickey claimed that the court of appeals' decision conflicted with the prior opinion of *Spencer v. Christiansen*.¹²⁶ Dickey argued the court in *Spencer* held a panel's report was inadmissible "if the medical review panel assumed or determined a disputed fact not requiring expertise in making its decision."¹²⁷ The supreme court dismissed Dickey's argument by finding that the quotation relied on from *Spencer* was "merely dicta."¹²⁸ The court in *Spencer* specifically held that the panel had not resolved the disputed fact and, consequently, could not have exceeded its authority.¹²⁹

The supreme court relied on Indiana Code section 16-9.5-9-9, which states:

[A]ny report of the expert opinion reached by the medical review panel shall be admissible as evidence in any action subsequently brought by the claimant in a court of law¹³⁰

The supreme court declared that "[t]he provision for admissibility is unambiguous and absolute."¹³¹ The court held that the court of appeals' opinion was correctly reasoned and that the panel's report was admissible as evidence.¹³²

F. Decisions by the Indiana Court of Appeals Regarding Causation Issues

In *Malooley v. McIntyre*,¹³³ the court of appeals declared that a plaintiff in a malpractice suit must proffer some evidence of causation when a medical review panel unanimously finds that no causation exists

125. *Id.*

126. 549 N.E.2d 1090 (Ind. Ct. App. 1990), *trans. denied*.

127. *Dickey*, 591 N.E.2d at 1010 (citing *Spencer*, 549 N.E.2d at 1091).

128. *Id.*

129. *Id.* at 1010-11 (citing *Spencer*, 549 N.E.2d at 1091-92).

130. *Id.* at 1011 (citing IND. CODE § 16-9.5-9-9 (1988) (emphasis in court's opinion, but not in original)).

131. *Id.* (quoting *Dickey v. Long*, 575 N.E.2d 339, 340 (Ind. Ct. App. 1991)).

132. *Id.*

133. 597 N.E.2d 314 (Ind. Ct. App. 1992).

between the defendant's actions and the plaintiff's injury or ailment.¹³⁴

In *Malooley*, the plaintiff failed to produce expert evidence that the conduct complained of was a factor in the plaintiff's injuries. McIntyre was admitted to University Heights Hospital on July 19, 1986, and evaluated and treated by Dr. Malooley, a neurologist. Electroencephalogram (EEG) and CT-scan tests were performed on McIntyre that produced abnormal results. Dr. Malooley released McIntyre and prescribed physical therapy and medication. Later, she was examined by Dr. Cure, who after consulting with Dr. Malooley, prescribed pain medication and also released her. On August 21, 1989, McIntyre was taken to Methodist Hospital Emergency Room, where Dr. Malooley ordered another CT Scan and lumbar puncture. McIntyre was later admitted to the Neuro Constant Care Unit at Methodist. On August 26, 1986, she underwent a clip ligation of a carotid artery aneurism. McIntyre died at Methodist on August 29, 1986.

The estate of McIntyre filed a proposed complaint with the Department of Insurance against Dr. Cure and Dr. Malooley. The medical review panel decided that there was no causal link between McIntyre's death and the actions of the defendants. Two of the panel members found the doctors' conduct was not a factor in the death. The third member found it was impossible to tell from the evidence whether the doctors' conduct was a factor.

The estate of the deceased filed suit in civil court, and Dr. Malooley and Dr. Cure filed separate motions for summary judgment. The defendants argued that: the panel did not find a causal link between McIntyre's death and the actions of the doctors, and that the estate presented no expert opinion or other evidence of a causal link.¹³⁵ The trial court denied both motions, and the defendants appealed.¹³⁶

The issue before the court of appeals was whether summary judgment is proper in a medical malpractice case in which there is no expert evidence that the defendants' conduct was a factor in the plaintiff's damages. The court recognized expert opinion is not always required in medical malpractice cases. Cases which the court recognized as not requiring expert testimony are those in which negligence may be inferred by resorting to common knowledge,¹³⁷ or those based on the doctrine of *res ipsa loquitur*.¹³⁸

134. *Id.* at 319.

135. *Id.* at 316.

136. *Id.*

137. *Id.* (citing *Stumph v. Foster*, 524 N.E.2d (Ind. Ct. App. 1988)).

138. *Id.* at 319. *See also* *Killebrew v. Johnson*, 404 N.E.2d 1194, 1197 n.2 (Ind. Ct. App. 1980).

The court noted that the cases recognizing the exceptions to the expert testimony requirement relate to the issue of the standard of care only. This case was different. The standard of care and the breach of the standard were established by evidence. Only the question of proximate cause had not been proven by independent evidence. The court stated that the issue of causation involved "the delicate inter-relationship between a particular medical procedure and the causative effect of that procedure upon a given patient's structure, endurance, biological make-up and pathology" and that such an issue was not susceptible to resolution by common knowledge.¹³⁹

Thus, the court held that when no member of a review panel opines that causation exists, the plaintiff in a civil suit must do more than rest upon his complaint.¹⁴⁰ Evidence must be proffered so that the trial court could reasonably infer a causal link between the health care provider's actions and the complainant's damage.¹⁴¹

In *Dillon v. Glover*,¹⁴² the court of appeals held that the Patient's Compensation Fund of Indiana may argue that the wrong standard was adopted for compensation of an injury in a petition for excess damages from the Fund, but that it cannot litigate the issue of proximate causation after a provider has settled its liability.¹⁴³ In *Dillon*, the complainant settled with the defendants out of court for \$100,000. The complainants then petitioned for excess damages from the Fund, pursuant to Indiana Code section 16-9.5-4-3.¹⁴⁴ The trial court awarded \$400,000 from the

139. *Malooley*, 597 N.E.2d at 319.

140. *Id.*

141. *Id.*

142. 597 N.E.2d 971 (Ind. Ct. App. 1992). Glover, a cigarette smoker, began experiencing pain in the right side of his chest in 1983. On January 11, 1984, X-rays of Glover's chest were taken and analyzed by Dr. Garvish at Radiology Services, Inc. ("RSI"). Dr. Garvish determined that the X-ray revealed no abnormality and no further tests were performed. In October, 1984, X-rays were again taken and a cancerous tumor in his lung was discovered. The tumor had grown 400% since January and the growth prevented surgical treatment of the tumor. Glover died on June 12, 1986. The personal representative of Glover's estate instituted a medical malpractice action against Dr. Garvish and RSI for wrongful death, claiming that their negligence in misreading Glover's X-ray proximately caused his death.

143. *Id.* at 973-74.

144. Section 16-9.5-4-3 provides, in pertinent part:

If a health care provider or its insurer has agreed to settle its liability on a claim by payment of its policy limits of \$100,000, and the claimant is demanding an amount in excess thereof, then the following procedure must be followed:

...

(5) . . . if the Commissioner, the health care provider, the insurer of the health care provider, and the claimant cannot agree on the *amount*, if any, to be paid out of the patient's compensation fund, then the Court, *after hearing any relevant*

Fund to Glover's wife for loss of love, care, and affection. The Fund¹⁴⁵ appealed and argued the defendants' negligence did not proximately cause Glover's death. Rather, they argued it only cost him a *chance* to live and that cancer was the proximate cause of Glover's death. Therefore, they argued that plaintiff should not be compensated by the Fund.

The court examined Indiana Code section 16-9.5-4-3, which contemplates that, upon a petition for excess damages, the trial court will determine the *amount* of damages, not *whether* the provider is liable for damages. The appeals court declared: "This statute is unambiguous, in fact it could be characterized as a paragon of clarity."¹⁴⁶

The court then found that "[i]n determining the amount to be paid from the Fund 'the court shall consider the liability of the health care provider as admitted and established' if it has agreed to settle its liability."¹⁴⁷ The court distinguished this case from *Eakin v. Kumiega*,¹⁴⁸ by recognizing that injuries from negligent infliction of emotional distress are noncompensable, whereas death is a compensable injury.¹⁴⁹

In *Chambers ex rel. Hamm v. Ludlow*,¹⁵⁰ the Indiana Court of Appeals recognized that not every element of a *prima facie* case of medical malpractice must be established by *one* expert opinion and that there are certain circumstances in which testimony is better divided among more than one expert.¹⁵¹ Chambers' proposed complaint was submitted to a medical review panel. Two of the doctors on the panel opined that the evidence did not support the conclusion that the defendants breached

evidence on the issue of claimant's damages, submitted by any of the parties described in this section, shall determine the *amount* of claimant's damages, if any, in excess of the \$100,000 already paid by the insurer of the health care provider. The Court shall determine the *amount* for which the fund is liable and render a finding and a judgment accordingly. In approving a settlement or determining the *amount*, if any, to be paid from the patient's compensation fund, the Court shall consider *the liability of the health care provider as admitted and established*.

IND. CODE § 16-9.5-4-3 (Supp. 1992) (emphasis supplied).

145. The Fund refers to the appellant-respondent, John Dillon, the Commissioner of Insurance of Indiana and the Administrator of the Patient's Compensation Fund of Indiana.

146. *Dillon*, 597 N.E.2d at 973.

147. *Id.* (quoting IND. CODE § 16-9.5-4-3 (Supp. 1992)).

148. 567 N.E.2d 150 (Ind. Ct. App. 1991).

149. *Dillon*, 597 N.E.2d at 973 (citing IND. CODE § 34-1-1-2 (1988)).

150. 598 N.E.2d 1111 (Ind. Ct. App. 1992). Chambers was delivered by caesarean section after numerous attempts were made to deliver him naturally. Later, he was diagnosed as having severe metabolic acidosis, severe respiratory depression, seizures, and a possible inter-cranial hemorrhage. Chambers is mentally retarded. Chamber's complaint alleged that his mental retardation was the result of injuries he sustained during his birth caused by the medical malpractice of Dr. Ludlow and the hospital.

151. *Id.* at 1117.

the applicable standard of care. The other panelist opined that the defendants did breach the applicable standard of care but that the "conduct complained of was not a factor of the resultant damages."¹⁵²

The plaintiff filed a medical malpractice action in the trial court and the defendants moved for summary judgment, submitting the medical review panel's opinion as support. The court stated that when the medical review panel opines that the plaintiff failed to satisfy any element of his *prima facie* case, as it did in this case, the plaintiff must produce expert medical testimony to refute the panel's opinion to survive summary judgment.¹⁵³ In opposition to the motion, plaintiff submitted affidavits of two physicians. One opined that the medical care and treatment rendered to Chambers and his mother by Ludlow and the hospital fell below a reasonable standard of care and resulted in the birth injuries. The other opined that the injuries Chambers suffered at birth caused his mental retardation.

To establish a *prima facie* case of medical malpractice, the plaintiff must establish by expert testimony three things: (1) the applicable standard of care, (2) how the defendant doctor breached that standard of care, and (3) that the defendant doctor's negligence in doing so was the *proximate cause* of the injuries complained of.¹⁵⁴ When the Medical Review Panel opines that the plaintiff has failed to satisfy any one element of his *prima facie* case, the plaintiff must then come forward with expert medical testimony to refute the Panel's opinion in order to survive summary judgment.¹⁵⁵

The defendants asserted that the plaintiff's affidavit failed to set out the applicable standard of care under Indiana law. The Court refused to express an opinion on the issue because the medical review opinion of one panelist established for the purposes of summary judgment that the defendants did fail to comply with the appropriate standard of care as charged in plaintiff's complaint.¹⁵⁶ The panelist's opinion established all but the third element of Chamber's *prima facie* case, the element of proximate cause. Therefore, the plaintiff was "able to survive summary judgment by establishing, through expert medical testimony that the medical negligence charged in his complaint was the proximate cause of his complained of injuries and damages."¹⁵⁷ The court held that for the

152. *Id.* at 1114.

153. *Id.* at 1116 (citing *Malooley v. McIntyre*, 597 N.E.2d 314 (Ind. Ct. App. 1992); *Stackhouse v. Scanlon*, 576 N.E.2d 635 (Ind. Ct. App. 1991), *trans. denied*).

154. *Id.* (citing *Bethke v. Gammon*, 590 N.E.2d 573 (Ind. Ct. App. 1991)).

155. *Id.*

156. *Id.* at 1117.

157. *Id.* at 1117-18.

purpose of summary judgment, the affidavits were competent to establish that the conduct Chambers complained of was the proximate cause of his injuries and mental retardation.¹⁵⁸

II. PROXIMATE CAUSE IN MEDICAL MALPRACTICE CASES

A. *Proximate Cause in Indiana — General Standards in Negligence Cases*¹⁵⁹

It is settled law in Indiana that tortious conduct need not be the sole proximate cause of the injury to support recovery of damages.¹⁶⁰ "It is sufficient if the act, concurring with one or more efficient causes, other than the plaintiff's fault, is the proximate cause of the injury."¹⁶¹ As the Indiana Court of Appeals explained in *Boyle v. Anderson Fire-fighters Ass'n Local 1262*,¹⁶² "[T]here can be more than one proximate cause attributed to a particular injury, and 'the fact that accidental or innocent causes or conditions and concurring wrongful acts of other parties joined to produce a given injury does not affect the liability of any one of the wrongdoers.'"¹⁶³

Indiana law on proximate cause is illustrated by the analysis in *Ortho Pharmaceutical Corp. v. Chapman*.¹⁶⁴ The plaintiff there prevailed on a showing that the defendant's failure to provide an adequate warning in regard to the health hazards of its oral contraceptive was a proximate cause of the plaintiff's injuries. The defendant had argued that the injury was not causally connected to the inadequacy of the warning due to the occurrence of several other factors. The factors included evidence that even an adequate warning would not have been heeded, that the drug was used beyond the prescription dosage, and that the plaintiff failed to report preliminary symptoms. The court examined each factor and concluded that, despite the convergence of these independent cir-

158. *Id.* at 1118.

159. Special thanks to Todd A. Richardson of Lewis & Kappes for his research and analysis on the law of proximate cause in Indiana.

160. *E.g.*, *Elder v. Fisher*, 217 N.E.2d 847, 852 (Ind. 1966).

161. *Id.*

162. 497 N.E.2d 1073 (Ind. Ct. App. 1986).

163. *Id.* at 1083 (quoting *City of Indianapolis v. Bates*, 205 N.E.2d 839, 848 (Ind. Ct. App. 1965) (quoting *South Bend Elec. Co.*, N.E.2d 786, 793 (Ind. Ct. App. 1980))); see also *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541, 555 (Ind. Ct. App. 1979) ("The defendant's acts need not be the sole proximate cause; many causes may influence a result."); *Surratt v. Petrol, Inc.*, 312 N.E.2d 487, 495 (Ind. Ct. App. 1974) ("To effect liability, the law does not require defendant's conduct to be the *only* causative act.").

164. 388 N.E.2d 541, 555-58 (Ind. Ct. App. 1979).

cumstances, judgment for the plaintiff was soundly supported by evidence that the inadequacy of the warning was a substantial contributing factor of the injury.¹⁶⁵

Under Indiana law, the ultimate test of proximate cause is reasonable foreseeability. "In determining whether a cause of injury is actionable, the test is to be found not in the number of intervening events, but in the character of the original act and its natural and probable consequences."¹⁶⁶ "[I]t is well-settled that for a negligent act or omission to be a proximate cause of injury, the injury need be only a natural and probable result thereof; and the consequence be one which in the light of the circumstances should reasonably have been foreseen or anticipated."¹⁶⁷ Indiana courts have consistently held that the fundamental test of proximate cause is one of reasonable foreseeability, even in the presence of allegedly intervening causes.¹⁶⁸

B. Evidence Required to Prove Proximate Cause in Medical Malpractice Cases

To establish a *prima facie* case of medical malpractice, a plaintiff must demonstrate "(1) a *duty* on the part of the defendant in relation to the plaintiff; (2) *failure* on the part of defendant to conform his or her conduct to the requisite standard of care required by the relationship; and (3) an *injury* to the plaintiff resulting from that failure."¹⁶⁹

Generally, in order to maintain a claim of medical malpractice, the plaintiff must establish by expert medical testimony (1) the applicable *standard of care* required by Indiana law; (2) *how*

165. *Id.* See *Johnson v. Bender*, 369 N.E.2d 936, 939-40 (Ind. Ct. App. 1977) ("Thus, if the defendant's negligence is a substantial factor in producing plaintiff's injury, and if the particular injury suffered is one of a class that was reasonably foreseeable at the time of the defendant's wrongful act, then there is a causal relation in fact as well as legal cause."). See also *Harper v. Guarantee Auto Stores*, 533 N.E.2d 1258, 1264 (Ind. Ct. App. 1989); *Yater v. Keil*, 351 N.E.2d 920, 924 (Ind. Ct. App. 1976).

166. *Harper*, 533 N.E.2d at 1264.

167. *Elder v. Fisher*, 217 N.E.2d 847, 852 (Ind. 1966). See also *Peavler v. Board of Comm'rs of Monroe County*, 557 N.E.2d 1077, 1080 (Ind. Ct. App. 1990).

168. See *Dreibelbis v. Bennett*, 319 N.E.2d 634, 638 (Ind. Ct. App. 1974) ("[T]he ultimate test of legal proximate causation is reasonable foreseeability. The assertion of an intervening, superseding cause fails to alter this test."); *City of Indianapolis v. Falvey*, 296 N.E.2d 896, 903 (Ind. Ct. App. 1973) ("The question of whether or not an intervening act is present does not change the test of reasonable foreseeability in determining proximate cause."); *Stauffer v. Ely*, 270 N.E.2d 889, 892 (Ind. Ct. App. 1971) ("In short, reasonable foreseeability is still the fundamental test of proximate cause, and this rule is not changed by the existence of an intervening act or agency.").

169. *Oelling v. Rao*, 593 N.E.2d 189, 190 (Ind. 1992) (citations omitted) (emphasis added).

the defendant health care provider *breached* that standard of care; and (3) that the defendant doctor's negligence in doing so was the *proximate cause* of the injuries complained of.¹⁷⁰

Expert opinion evidence is not, however, always required in medical malpractice cases.¹⁷¹ One category of such cases are those which fall within the "common knowledge" exception to the need for expert testimony.¹⁷² Where negligence on the "part of a doctor is demonstrated by facts which can be evaluated by resorting to common knowledge, expert testimony is not required."¹⁷³ In addition, Indiana courts have also "occasionally dispensed with the need for expert opinion based upon the doctrine of *res ipsa loquitur*."¹⁷⁴

The exceptions to the expert testimony requirement have mainly been applied to cases dealing with the issue of breach of the standard of care.¹⁷⁵ The court of appeals in *Malooley* recognized:

Application of this exception in such cases is appropriate when limited to situations in which the complained-of conduct is so obviously substandard that one need not possess medical expertise in order to recognize the breach. It is otherwise when the question involves the delicate inter-relationship between a particular medical procedure and the causative effect of that procedure upon a given patient's structure, endurance, biological make up, and pathology. The sophisticated subtleties of the latter question are not susceptible to resolution by resort to mere common knowledge.¹⁷⁶

Based on this statement, the medical malpractice practitioner choosing not to use expert opinion to establish the causal link between the complainant's injuries and the defendant's acts or omissions may be taking a risk. It would be a prudent measure to establish the element of proximate cause by means of expert testimony. When the panel opinion states that the complainant failed to establish any element of the mal-

170. *Chambers ex rel. Hamm v. Ludlow*, 598 N.E.2d 1111, 1116 (Ind. 1992) (citing *Bethke v. Gammon*, 590 N.E.2d 573 (Ind. Ct. App. 1991)) (emphasis added). The defendant's conduct only has to be a "factor" causing plaintiffs harm or injury. IND. CODE § 16-9.5-9-7(D) (1988).

171. *Malooley v. McIntyre*, 597 N.E.2d 314, 318 (Ind. Ct. App. 1992). *See supra* notes 133-41 and accompanying text.

172. *Malooley*, 597 N.E.2d at 318.

173. *Stumph v. Foster*, 524 N.E.2d 812, 816 (Ind. Ct. App. 1988) (quoting *Mascarenas v. Gonzales*, 497 P.2d 751, 753-54 (N.M. Ct. App. 1992)).

174. *Malooley*, 597 N.E.2d at 319. *See supra* note 135.

175. *Id.*

176. *Id.*

practice case, it is imperative that the plaintiff submit expert opinion in the form of affidavit¹⁷⁷ proving such element.

The issue of sufficiency of medical testimony to establish proximate cause of a plaintiff's injury was addressed in *Ingersoll-Rand Corp. v. Scott*.¹⁷⁸ Scott's medical witness testified in terms of mere possibility, as opposed to probability or reasonable medical certainty. The court stated:

An emphasis upon the standard used to evaluate medical testimony is appropriate when such evidence is the *only evidence to establish proximate cause*. Where, however, there is other independent evidence from which a reasonable trier of fact may find the causal link, medical testimony which is not counted in terms of certainty or strong probability is not fatal to a plaintiff's verdict.¹⁷⁹

In *Ingersoll*, there was independent evidence which related to causation. The court in *Ingersoll* stated, "The evidence here as to the occurrence itself gives rise to a permissible conclusion of proximate cause."¹⁸⁰

Indiana case law has explicitly determined that when a member of a medical review panel opines that causation does not exist or cannot be determined from the evidence, the complainant, to avoid summary judgment, must present evidence from which the trial court can reasonably infer a causal link between the health care provider's acts or omissions and the complainant's injuries.¹⁸¹

It is also established that to withstand summary judgment, the opinion of the medical review panel is sufficient to establish at least some of the elements of the complainant's *prima facie* case.¹⁸² As in *Chambers*, additional expert opinion testimony may be necessary to establish one of the three elements of the medical malpractice case not established by the panel's opinion, such as the element of proximate cause.¹⁸³

Thus, it appears that the general rules regarding proof of proximate cause in negligence cases apply to medical malpractice cases, but that there are special considerations regarding proof of this element of the tort. Plaintiffs are required to prove that the negligence (*i.e.*, breach of the standard of care) was a substantial factor in causing harm to the

177. See IND. TRIAL R. 56(C).

178. 557 N.E.2d 679 (Ind. Ct. App. 1990).

179. *Id.* at 681.

180. *Id.* (footnote omitted).

181. *E.g.*, Malooley v. McIntyre, 597 N.E.2d 314, 319 (Ind. Ct. App. 1992).

182. *E.g.*, Chambers *ex. rel.* Hamm v. Ludlow, 598 N.E.2d 1111, 1117 (Ind. Ct. App. 1992); see *supra* note 156 and accompanying text.

183. See *supra* note 157 and accompanying text.

plaintiff. The test for whether or not the negligent act was a substantial factor will be the foreseeability of the harm to the plaintiff from the point of the negligent act. Further, the question of proximate cause is one for the trier of fact.

Proof of proximate cause in medical negligence cases will come in three forms. First, in a limited number of cases, the proximate cause issue will be so obvious from the evidence of the standard of care and breach that the jury may be allowed to refer to its "common knowledge" in arriving at a decision on the issue of proximate causation. An example of this may be leaving scissors inside a body cavity following surgery.

Second, there may be "independent evidence" relating to causation, such as in the *Ingersoll* case. This may come from evidence relating to the medical treatments required to correct the problem created by the defendant's breach of the standard of care, or from physical evidence relating of plaintiff's condition before the negligence of the defendant, as compared with plaintiff's physical condition after the negligent act.

Finally, there can be specific opinion testimony from a qualified expert regarding whether the negligence of the defendant was a substantial factor causing harm to the plaintiff. An expert may specifically testify that the harm to the plaintiff was one of the untoward consequences that could have been foreseen from the point of the defendant's negligent act.

Survey of Recent Developments in Insurance Law

JOHN C. TRIMBLE*
RICHARD K. SHOULTZ**

INTRODUCTION

For this Survey,¹ the area of insurance law received a great deal of attention. Although many areas of insurance law received consideration,² this Article will limit its focus to insurance law issues most likely to be confronted by the general practitioner.

The most notable decision within the survey period deals with the question of whether an insured's statement to his insurer is discoverable by opposing parties. The decision, *Richey v. Chappell*,³ is not specifically an insurance law case, but it does significantly affect the handling of insured claims. The decision overturns prior Indiana law⁴ (allowing the disclosure of an insured's statement) and creates a privilege making the statement nondiscoverable.⁵

* Partner, Lewis & Wagner, Indianapolis. B.A., 1977, Hanover College; J.D., 1981, Indiana University School of Law—Indianapolis.

** Associate, Lewis & Wagner, Indianapolis. B.A., 1987, Hanover College; J.D., 1990, Indiana University School of Law—Indianapolis.

1. The survey period for this area of law is approximately Sept. 1, 1991, to Oct. 31, 1992.

2. Many cases addressed existing insurance law issues. Practitioners may want to review these cases to refresh their insurance law background: *State Farm Mut. Auto. Ins. Co. v. Latham*, 793 F. Supp. 183 (S.D. Ind. 1992) (addressing whether automobile liability coverage applied to passenger who drove automobile without owner's consent); *Allstate Ins. Co. v. Shockley*, 793 F. Supp. 852 (S.D. Ind. 1991) (addressing definition of "household resident" for purpose of homeowner's liability policy); *Property Owners Ins. Co. v. Cope*, 772 F. Supp. 1096 (N.D. Ind. 1991) (addressing whether entertaining client was part of "business conduct" by insured to entitle him to business liability coverage); *American Family Mut. Ins. Co. v. Lane*, 782 F. Supp. 415 (S.D. Ind. 1991) (employee who engaged in fight outside of employer's business was outside of business activity so that employer's liability coverage was inapplicable); *Troxell v. American States Ins. Co.*, 596 N.E.2d 921 (Ind. Ct. App. 1992) (policy time limitation to sue insurer enforceable); *Allstate Ins. Co. v. Kepchar*, 592 N.E.2d 694 (Ind. Ct. App. 1992) (insured's failure to give notice of an occurrence to insurer barred coverage for occurrence); *Koenig v. Bedell*, 601 N.E.2d 453 (Ind. Ct. App. 1992) (insured's failure to advise insurer of loss within reasonable time barred coverage to insured).

3. 594 N.E.2d 443 (Ind. 1992).

4. See, e.g., *DeMoss Rexall Drugs v. Dobson*, 540 N.E.2d 655, 657 (Ind. Ct. App. 1989); *Snodgrass v. Baize*, 405 N.E.2d 48, 54 (Ind. Ct. App. 1980).

5. *Richey*, 594 N.E.2d at 447.

This Article also will address other important decisions concerning insurance agent and insurance company liability, health and medical insurance issues, and automobile insurance issues. Additionally, several decisions concerning uninsured/underinsured motorist law will be addressed.

I. DISCOVERABILITY OF AN INSURED'S STATEMENT

The *Richey v. Chappell* decision has had significant impact on both plaintiff and defense attorneys. The decision creates a privilege against disclosure of statements given by an insured to his insurer concerning an occurrence that may have been covered by liability insurance.⁶ By creating this privilege, the Indiana Supreme Court has remedied many conflicts among insureds, insurers, and insurance defense attorneys.

Past readers of this Survey may recall the problems raised⁷ when the Indiana Court of Appeals decided *DeMoss Rexall Drugs v. Dobson*.⁸ Specifically, those problems consisted of increased trial court supervision of discovery,⁹ the limitation of prelitigation investigation by an insurer to the detriment of its insured,¹⁰ and the most significant problem, the detrimental effect upon the level of cooperation expected between an insured and his or her insurer.¹¹

Practically all liability insurance policies include a cooperation clause requiring the insured to cooperate with his or her insurer in the investigation and defense of a claim.¹² These clauses meant, prior to *Richey*, that an insured risked invalidating the coverage if he or she failed to cooperate with the insurer.¹³ At the same time, when a plaintiff also sought recovery against the insured for claims not covered by the insurance, the plaintiff could gain access to statements made by the insured

6. *Id.*

7. See John C. Trimble, *Survey of Recent Developments in Insurance Law*, 23 IND. L. REV. 431, 432-36 (1990).

8. 540 N.E.2d 655 (Ind. Ct. App. 1989).

9. See Trimble, *supra* note 7, at 434-35.

10. *Id.* at 435.

11. *Id.*

12. Generally, cooperation clause language provides:

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

....

B. A person seeking any coverage must:

1. Cooperate with us in the investigation, settlement or defense of any claim or suit.

1 SUSAN J. MILLER & PHILIP LEFEBVRE, *MILLER'S STANDARD INS. POLICIES ANN.* 10 (1988).

13. See *Miller v. Dilts*, 463 N.E.2d 257 (Ind. 1984).

to the insurer that could reveal evidence damaging to the insured's defense.

The Indiana Supreme Court recognized these problems in deciding *Richey*. By establishing a privilege for statements given to the insurer by the insured,¹⁴ the court eliminated the potential conflict that existed if the statement was revealed to the plaintiff. In the future, the decision should reduce the increased burden placed upon trial courts due to their pre-*Richey* involvement in discovery disputes.

The *Richey* decision will significantly curtail the ability of plaintiffs' attorneys to discover statements of insured defendants. The decision establishes the same protection between insured and insurers as that between plaintiffs and their attorneys and, in doing so, eliminates the potential conflict between insured and insurer. The elimination of this conflict should pave the way for the free flow of communication and cooperation between insureds and insurers.

II. INSURANCE AGENT/BROKER LIABILITY

During the Survey period, the courts addressed insurance agent liability in two different contexts. The first context focused on an agent's duty to advise a prospective insured regarding available uninsured/underinsured motorist policy limits. The second context addressed whether an insurance broker represents the insured or the insurer.

In *Craven v. State Farm Mutual Insurance Co.*,¹⁵ Craven was involved in an accident with an uninsured motorist. After she submitted a claim to her insurer, she discovered her uninsured motorist limits were less than her bodily injury liability limits. Craven sued her insurer claiming the insurer and the agent violated Indiana law by providing uninsured motorist coverage in an amount less than her bodily injury liability coverage.¹⁶ However, the court rejected the claim because the statute requiring the offering of identical limits had not become effective until after Craven's policy had been first issued.¹⁷

The most important aspect of this case concerned Craven's second theory of recovery. Craven claimed her agent was negligent in failing to advise her that the uninsured motorist coverage was less than her bodily injury policy limits and that additional coverage was available.

14. *Richey v. Chappell*, 594 N.E.2d 443, 446 (Ind. 1992).

15. 588 N.E.2d 1294 (Ind. Ct. App. 1992).

16. IND. CODE § 27-7-5-2(a) (Supp. 1992) requires an insurer to offer uninsured/underinsured motorist coverage to its insured in an amount equal to the bodily injury liability limits.

17. *Craven*, 588 N.E.2d at 1296.

The court was faced with the issue of what duty an insurance agent or broker owed to an insured to advise of the amount of limits the insured could obtain for both coverages.

Unfortunately, the court's response lacked any guidance to practitioners representing insurance agents or brokers. The court found the agent was not liable to the insured for violating a duty.¹⁸ However, the court stated an agent might possess a duty to advise an insured concerning insurance matters including the amount of available coverage limits "upon a showing of an intimate long term relationship between the parties or some other special circumstances."¹⁹

The court's decision gives no assistance as to what factors are needed to establish "an intimate long term relationship." Consequently, practitioners who advise or represent insurance agents and brokers face difficulty in advising their clients as to what duty is owed an insured. Until the courts elaborate the factors that may be used to determine whether the duty exists, this particular area of insurance law will continue to be ripe for litigation.

During the survey period, a most interesting case addressed the problem area of whether an agent/broker is the agent of the insured or the insurer.²⁰ Readers of this Survey may recall a past article²¹ addressing the case of *Aetna Insurance Co. v. Rodriguez*.²² The *Rodriguez* decision caused great consternation to attorneys and insurance agents/brokers based on the Indiana Supreme Court's blanket statement, "in Indiana when a broker makes application for insurance and the insurance policy is issued, the broker is the agent of the insurer and can bind it within the scope of his authority."²³ This blanket statement took Indiana out of the mainstream of American law on this issue,²⁴ which has held a broker is the agent of the insured, not the insurer.²⁵

However, in *Callis v. State Automobile Insurance Co.*,²⁶ the court of appeals revisited this issue. Callis had purchased a truck from Ar-

18. *Id.* at 1298.

19. *Id.* at 1297.

20. *Callis v. State Auto. Ins. Co.*, 579 N.E.2d 129 (Ind. Ct. App. 1991).

21. John C. Trimble, *Insurance Law*, 22 IND. L. REV. 229, 229-34 (1989) [hereinafter *Insurance*].

22. 517 N.E.2d 386 (Ind. 1988).

23. *Id.* at 388.

24. *Insurance*, *supra* note 21, at 233.

25. See *Automobile Underwriters, Inc. v. Hitch*, 349 N.E.2d 271, 276 (1976) (The court quoted the general rule to be "[a]n insurance broker can be considered an agent [of the insurer] only for the purposes of delivering policies and collecting premiums thereon. The insurer would not be bound, ordinarily by the mistakes or negligence of a broker." (citing 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 8730 (1968))).

26. 579 N.E.2d 129 (Ind. Ct. App. 1991).

chitectural Brick. Under the purchase agreement, Architectural Brick was to deduct from Callis' earnings the cost of the truck and premiums for insurance. The premiums were to be forwarded on to Wren, an insurance agent.

Wren knew that Callis had an interest in the truck. However, the insurance policy omitted Callis as an owner. After a fire to the truck, Callis discovered that the policy had expired and that Wren was "pocketing" the premiums without purchasing insurance for the truck. After being included as a defendant in a lawsuit against the insurance company by Architectural Brick, Callis cross-claimed against the insurer for the negligent or wilful actions of Wren, the agent.²⁷

Although the court reversed the trial court's summary judgment in favor of the insurer,²⁸ the court opened the door for the argument that in some cases, the negligent actions of an insurance broker should not be imputed to the insurer.²⁹ This case may be the first step to the courts' realization that in the broker situation, the insurer should not be responsible for the broker's actions. Such a realization would put Indiana back in the mainstream of American law on this issue.

III. ACTIONS AGAINST INSURERS

The case of *Indiana Insurance Co. v. Plummer Power Mower & Tool Rental, Inc.*³⁰ should prove interesting to all practitioners who either sue or defend insurance companies. The case addresses the issue of whether an insured can recover consequential damages for breach of contract from the insurer in excess of the policy limits.³¹

In *Plummer*, an insurer denied payment to its insured for an explosion and fire that occurred in a commercial building owned by the Plummers. The insurer denied payment based on the Plummers failure to document losses and the insurer's contention the Plummers intentionally set the fire.³² After a jury trial, the Plummers were awarded compensatory and punitive damages as well as attorney fees.³³

The *Plummer* case represents the first time the compensatory damages issue has been addressed by an Indiana court since the issue was clouded by *Burleson v. Illinois Farmers Insurance Co.*³⁴ In *Burleson*, the United States District Court for the Southern District of Indiana found an

27. *Id.* at 131.

28. *Id.* at 132.

29. *Id.* at 131.

30. 590 N.E.2d 1085 (Ind. Ct. App. 1992).

31. *Id.* at 1089-92.

32. *Id.*

33. *Id.* at 1087-88.

34. 725 F. Supp. 1489 (S.D. Ind. 1989).

insurer could not be liable for consequential damages caused by the insurer's breach of the contract if the insurer acted in good faith in denying the insured's claim.³⁵

The *Plummer* court refused to follow the *Burleson* decision that good faith of the insured could prevent the insured from recovering consequential damages from the insurer.³⁶ Instead, the court concluded that foreseeable consequential damages are recoverable for an insurer's breach of the contract regardless of the insurer's good faith:

Simply, put, the insurer cannot look at an insured's loss of livelihood and loss of home, shrug its shoulders, and hide behind the fact it made an "honest mistake." Delay, whether in good or bad faith, has clearly foreseeable consequences.³⁷

Furthermore, if the consequential damages exceed the limits of the policy, the insured may still recover them from the insurer if the damage was reasonably foreseeable at the time the parties entered into the contract.³⁸

This case is also enlightening on the issue of what damages are recoverable from an insurer for breach of contract. No longer will an insurer's good faith be a defense to a claim for consequential damages. Instead, if the consequential damages were reasonably foreseeable at the time of the breach of the contract, then they will be recoverable regardless of the insurer's intent.³⁹

Another case that should prove interesting to practitioners who handle workers compensation cases is *Stump v. Commercial Union*.⁴⁰ In *Stump*, the Indiana Supreme Court decided a certification question from the United States District Court for the Northern District of Indiana. The precise question certified was whether "Indiana law permit[ted] a cause of action by an injured employee against an employer's worker's compensation carrier for that carrier's actions during its processing and handling of the worker's compensation claim."⁴¹

The Indiana Supreme Court expressly recognized an employee's right to pursue an action directly against the worker's compensation carrier for tortious conduct such as gross negligence, intentional infliction of

35. *Id.* at 1490-95.

36. *Plummer*, 590 N.E.2d at 1092.

37. *Id.* at 1092 n.6.

38. *Id.* at 1092.

39. *Id.*

40. 601 N.E.2d 327 (Ind. 1992).

41. *Id.* at 329. The specific actions by the insurer which were being challenged included gross negligence, intentional infliction of emotional distress, constructive fraud, breach of duty to act in good faith, breach of a fiduciary duty, and intentional deprivation of worker's rights under the Worker's Compensation Act, IND. CODE. § 22-3-2-6 (1982), amended by *Id.* § 22-3-2-6 (Supp. 1992).

emotional distress, or constructive fraud.⁴² However, the supreme court determined that an employee does not possess a right to sue the carrier for breach of a duty to act in good faith⁴³ and breach of fiduciary duty between an insured and an insurer.⁴⁴

This case carries importance in that carriers must deal in good faith in handling worker's compensation claims by employees. In *Stump*, the court has created a direct cause of action by the employee against the carrier by recognizing that the exclusive remedies of the Indiana Worker's Compensation Act⁴⁵ do not bar such direct actions.

IV. HEALTH/MEDICAL INSURANCE CASES

A. Representations in Product Brochures

The decision in *Palsce v. Guarantee Trust Life Insurance Co.*⁴⁶ should be reviewed by any health insurance law practitioner. In *Palsce*, the insureds purchased health insurance after their son brought home the insurer's brochure from school. The brochure contained the representation among others, that the policy provided maximum benefits of \$25,000 for each accident. Later, the insureds presented a claim to the insurer for nearly \$12,000 after their son suffered an injury to his right eye resulting in permanent blindness. The insurer informed the insureds that the insurance policy, a master copy of which was available at the school but never provided to the insurers, provided maximum limits of only \$1,000 for loss of an eye. This limitation was contained on the master policy but was not mentioned on the brochure even though some exclusions under the coverage were mentioned.

The *Palsce* court reviewed decisions from other jurisdictions to hold the insurer was liable for the greater policy amount pursuant to the broader representations in the brochure rather than the policy.⁴⁷ The court found a conflict between the representations of coverage in the brochure and the master policy and applied the broader coverage.⁴⁸

42. *Stump*, 601 N.E.2d at 332-33.

43. *Id.* at 333. Although the supreme court recognized that the carrier has this duty, the exclusive right to pursue the carrier for a breach belongs to the Indiana Industrial Board. *Id.*

44. *Id.* at 334. The supreme court recognized that no fiduciary duty existed between the employee and the carrier.

45. IND. CODE. § 22-3-2-6 (1982), amended by *Id.* § 22-3-2-6 (Supp. 1992).

46. 588 N.E.2d 525 (Ind. Ct. App. 1992).

47. *Id.* at 527.

48. *Id.*

B. Representations by Agents

The case of *Plohg v. NN Investors Life Insurance Co.*⁴⁹ is similar to the previously mentioned *Palsce* decision. In *Plohg*, the insurer denied a health insurance claim by its insured pursuant to an exclusion for losses due to the insured's use of intoxicants.

However, the insured argued he was shown all of the exclusions when he sought insurance and the intoxication exclusion was not included or shown to him. He sought to preclude the exclusion because of the constructive fraud of the agent.

The court found the insured had relied upon the agent's representations and had canceled his existing insurance coverage in order to purchase the insurer's coverage.⁵⁰ As a result, the agent's representations governed the agreement rather than the actual policy language.⁵¹

V. AUTOMOBILE CASES

A. Definition of "Using" an Automobile

The question of "using an automobile" as defined in an insurance policy has been the subject of frequent litigation over the years. In this survey period, the subject was once again addressed in *American Family Mutual Insurance Co. v. National Insurance Ass'n.*⁵²

In *American Family*, an automobile mechanic was driving a van owned by Brown to a body shop for repairs when he had an accident. After the other driver recovered a judgment against the mechanic, the other driver sought a determination as to whether Brown's wife's insurance covered the mechanic's operation of the vehicle.⁵³

National Insurance claimed that coverage was excluded under the policy because the vehicle was "being used" by a person employed or engaged in the business of repairing automobiles.⁵⁴ After reviewing case

49. 583 N.E.2d 1233 (Ind. Ct. App. 1992).

50. *Id.* at 1236-37.

51. *Id.* at 1237.

52. 577 N.E.2d 969 (Ind. Ct. App. 1991).

53. *Id.* at 969-70.

54. *Id.* at 970. The exclusion stated:
This policy does not apply under Part 1:

....
(g) to an owned automobile while *used* by any person while such person is employed or otherwise engaged in the automobile business. . . .

....
"automobile business" means the business or occupation of selling, repairing, servicing, storing or parking automobiles.

Id.

law from other jurisdictions, the court determined the mechanic's act of operating the van to perform repairs was "using" the van within the exclusion.⁵⁵ Consequently, no coverage was found.⁵⁶

B. Duty to Defend

The case of *Liberty Mutual Insurance Co. v Metzler*,⁵⁷ is absolutely "must" reading for all insurance law practitioners. *Metzler* illustrates what can happen to an insurance company if it refuses to defend an insured under a reservation of rights or file a separate declaratory judgment action to determine its obligations when coverage for an insured in a tort lawsuit is in question.

In *Metzler*, the carrier insured a trucking company and its driver. The driver deviated from his route and stopped at a pub to meet his girlfriend.⁵⁸ After getting into an argument with his girlfriend, the driver proceeded to drive his semi-truck into the pub, killing one person and injuring many others including the Powells.

The Powells filed suit against the truck driver and trucking company for the intentional and negligent acts of the driver. Based on the driver's conviction for numerous intentional crimes, the carrier did not defend the insured because the carrier argued the intentional acts were excluded under the policy.⁵⁹ Later, after the carrier refused to defend, the Powells amended their complaint to seek recovery only for the driver's negligence and recovered a large monetary default judgment.⁶⁰

The Powells then attempted to recover the judgment from the carrier by adding the carrier to the lawsuit as a garnishee defendant.⁶¹ The carrier responded to the Powells' actions by asserting a counterclaim for declaratory judgment the policy did not cover the driver's actions because of the intentional act exclusion.⁶²

Unfortunately for the carrier, the court of appeals concluded the carrier was collaterally estopped from arguing the applicability of the intentional act exclusion based on the trial court's judgment in the Powells' favor under theories of negligence.⁶³ The court noted the carrier could have protected its interest in either of two ways: by filing a

55. *Id.* at 971-72.

56. *Id.* at 972.

57. 586 N.E.2d 897 (Ind. Ct. App. 1992)

58. *Id.* at 899.

59. *Id.*

60. Mrs. Powell received a judgment in the amount of \$1,600,000 and Mr. Powell's judgment was for \$150,000. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 901-02.

declaratory judgment action to determine its obligations under the policy or by defending the driver under a reservation of rights.⁶⁴ Because the carrier did neither, it was collaterally estopped from arguing the intentional act exclusion:

[a]n insurer, having knowledge its insured has been sued, may not close its eyes to the underlying litigation, force the insured to face the risk of that litigation without the benefit of knowing whether the insurer intends to defend or to deny coverage, and then raise policy defenses for the first time after judgment has been entered against the insured.⁶⁵

This case stresses the importance to carriers to take action to protect their interests.⁶⁶ Failure to do so may preclude the carrier from later asserting available coverage defenses.

C. *Uninsured/Underinsured Motorists Coverage*

During the survey period, a number of significant decisions were handed down regarding uninsured/underinsured motorists coverage in a number of different areas. Although not all cases are mentioned in this survey, the more noteworthy ones are included.

1. *Duty to intervene*.—The case of *Stewart v. Walker*⁶⁷ should prove interesting reading to all practitioners. Stewart was a passenger in a car involved in an accident with an uninsured motorist. Shortly after filing a complaint against the uninsured driver, Stewart informed her own uninsured motorist carrier and the carrier for her car's driver that she had filed suit but had not perfected service against the uninsured motorist.⁶⁸

Neither uninsured motorist insurance carrier intervened in the lawsuit.⁶⁹ Stewart recovered a judgment against the uninsured motorist in the amount of \$80,000.⁷⁰ In seeking satisfaction of her judgment, Stewart

64. *Id.* at 902.

65. *Id.*

66. Although the carrier was unsuccessful in reversing the large judgment based on the intentional act exclusion, the court reversed the judgment based on the fact the carrier was not collaterally estopped to litigate whether the driver's actions were within the scope of his employment. *Id.* at 905.

67. 597 N.E.2d 368 (Ind. Ct. App. 1992)

68. *Id.* at 370, 373-74.

69. In such a situation, a carrier must intervene in the insured's lawsuit to protect its interest or else be bound by the outcome of the insured's lawsuit. See *Vernon Fire and Cas. Ins. Co. v. Matney*, 351 N.E.2d 60, 65 (1976).

70. *Stewart*, 597 N.E.2d at 370.

filed a declaratory judgment action against both insurers to determine their obligations.⁷¹

Stewart's personal carrier argued it should not be bound by the judgment because it was not afforded an opportunity to intervene. Although the carrier admitted the insured notified the carrier of the lawsuit, it argued the insured did not advise them she was successful in obtaining service against the uninsured motorist before she obtained the default judgment. The court of appeals rejected this argument, concluding the carrier's receipt of the complaint was sufficient notice to allow the carrier to intervene and protect its interests.⁷²

The carrier for the driver of Stewart's car argued no coverage existed under its policy because the insured failed to comply with three conditions under the policy.⁷³ However, the court concluded the carrier waived these policy conditions by failing to notify Stewart of their existence or that they intended to rely upon them.⁷⁴

With respect to policy conditions, insurers must notify insureds of their existence, especially if asked by the insured:⁷⁵

We cannot but conclude that a duty of good faith dealing certainly must include an obligation to inform such a claimant of conditions precedent in the insurance contract, the more so when the nonparty claimant has asked whether the insurer requires any additional information in order to process the claim.⁷⁶

This requirement should be repeated by all carriers when they expect policy conditions to be followed. Insurers should not sit back, fail to advise an insured of a policy condition, and then attempt to bar coverage pursuant to the policy condition. Insurers have an affirmative duty to notify insureds before they can attempt to enforce a policy condition.⁷⁷

2. *Self-Insurers*.—Recently, in *City of Gary v. Allstate Insurance Co.*,⁷⁸ the court decided a case of first impression in Indiana: whether self-insured entities must provide uninsured motorist coverage to the

71. *Id.*

72. *Id.* at 372-73.

73. These conditions included (1) legal action against carrier had to be commenced within the time limit for bodily injury actions, (2) judgment against a responsible party would be binding only if the carrier consented to it, and (3) the insured had to provide a copy of the complaint and summons to the carrier if suit was brought against the responsible party. *Id.* at 374.

74. *Id.* at 376.

75. *Id.* at 375-76.

76. *Id.*

77. *Id.*

78. 598 N.E.2d 625 (Ind. Ct. App. 1992).

vehicle drivers.⁷⁹ Although the court found supporting authority from other jurisdictions for both sides of the issue, the court ultimately ruled that when the legislature passed Indiana's Uninsured Motorist Statute,⁸⁰ it intended for self-insured entities to provide uninsured motorist coverage.⁸¹

3. *Rejection of uninsured motorist coverage/limits.*—The case of *Pafco General Insurance Co. v. Providence Washington Insurance Co.*⁸² should prove to be interesting reading for any attorney who has a client injured by an uninsured motorist while driving a rental car. In *Pafco*, Baker leased an automobile from Ugly Duckling, which had a commercial automobile insurance policy for leased cars and had policy limits of \$60,000.00. When Baker leased the automobile, he represented to Ugly Duckling that he had full insurance coverage under his personal policy. Under the terms of the lease, Baker was forced to reject the uninsured motorist coverage offered from Ugly Duckling's carrier.

When Baker was involved in an accident with an uninsured motorist, he sought coverage under his personal policy with limits of \$25,000 and also pursuant to the policy covering Ugly Duckling. The court quickly concluded the forced rejection of the uninsured motorist coverage under Ugly Duckling's policy was contrary to Indiana's Uninsured Motorist Statute⁸³ and, therefore, invalid.⁸⁴ As a result, the court off-set the \$25,000 received from Baker's personal carrier and permitted Baker to recover an additional \$35,000 from Ugly Duckling's carrier.⁸⁵

Three other cases decided during this survey period, *Craven v. State Farm Mutual Automobile Insurance Co.*,⁸⁶ *Inman v. Farm Bureau Insurance*,⁸⁷ and *United Farm Bureau Mutual Insurance Co. v. Lowe*,⁸⁸ addressed whether a carrier must offer uninsured/underinsured coverage in the same amounts as an insured's liability limits when the insured's policy is renewed.

In 1987, the Indiana General Assembly amended the Indiana Uninsured Motorist Statute⁸⁹ to require insurers to make available to insureds the same amount of uninsured/underinsured motorist coverage as the

79. *Id.* at 626-29.

80. IND. CODE § 27-7-5-2 to -6.

81. *Allstate*, 598 N.E.2d at 629.

82. 587 N.E.2d 728 (Ind. Ct. App. 1992).

83. IND. CODE § 27-7-5-2 (Supp. 1992).

84. *Pafco*, 587 N.E.2d at 731.

85. *Id.* at 732.

86. 588 N.E.2d 1294 (Ind. Ct. App. 1992).

87. 584 N.E.2d 567 (Ind. Ct. App. 1992).

88. 583 N.E.2d 164 (Ind. Ct. App. 1991).

89. IND. CODE § 27-7-5-2 (Supp. 1992).

insured's liability limits.⁹⁰ The amendment to the statute took effect January 1, 1988.⁹¹ However, the statute was intended to apply to policies that were "first issued" after December 31, 1987.⁹²

These three cases addressed the question of whether, on a policy first written before December 31, 1987, but renewed after December 31, 1987, the insurer was required to make the higher liability limits available to an insured for uninsured/underinsured motorist coverage.

The overall conclusion from these three cases was that a policy renewed repeatedly with the same policy number is a "renewal" policy rather than a "first issued" policy and no compliance with the uninsured motorist statute is required.⁹³ If, however, the policy replaces an older policy or is a new policy, then the insurer must offer limits equal to the amount of the insured's liability limits.⁹⁴

These decisions may be helpful to practitioners based on the fact that many insureds possess existing policies first issued prior to 1987 and continually renewed by the insureds. Such policies may have lower uninsured motorist limits than liability limits, and the practitioner must look to the time the policy was first created, as well as the times of renewal, to determine what limits are available to the insured for uninsured/underinsured coverage.

4. *Stacking*.—During the survey period, two decisions, *American Economy Insurance Co. v. Motorists Mutual Insurance Co.*⁹⁵ and *State Farm Mutual Automobile Insurance Co. v. Conway*,⁹⁶ addressed an insured's ability to stack the policy limits of two or more uninsured motorist coverages. Each case came to the same conclusion: if policies contained an anti-stacking clause,⁹⁷ such a clause was enforceable, and policy limits from each policy would not be added together or stacked.⁹⁸

90. *Id.*

91. *Id.* (Historical and Statutory Notes).

92. *Id.*

93. *Craven v. State Farm Auto. Ins. Co.*, 588 N.E.2d 1294, 1296 (Ind. Ct. App. 1992); *Inman v. Farm Bureau Ins.*, 584 N.E.2d 567, 568-69 (Ind. Ct. App. 1992); *United Farm Bureau Mut. Ins. Co. v. Lowe*, 583 N.E.2d 164, 168-70 (Ind. Ct. App. 1992).

94. *Craven*, 588 N.E.2d at 1296; *Inman*, 584 N.E.2d at 568-69; *Lowe*, 583 N.E.2d at 168-70.

95. 593 N.E.2d 1242 (Ind. Ct. App. 1992)

96. 779 F. Supp. 963 (S.D. Ind. 1991).

97. In *American Economy*, one of the policies contained an antistacking clause, which stated:

If this policy and any other policy providing similar insurance apply to the same *accident*, the maximum limit of liability under all the policies shall be the highest applicable limit under any one policy.

593 N.E.2d at 1244.

98. *American Economy*, 593 N.E.2d at 1245; *Conway*, 779 F. Supp. at 968.

Instead, the highest available limit from *one* policy would be the total limit available to the insured.⁹⁹

In *American Economy*, another issue that might benefit some practitioners was addressed in dicta. The issue concerned whether a tortfeasor's liability limits may be offset against the insured's underinsured motorist coverage.¹⁰⁰ Without much discussion, the court concluded the carrier could not deduct the tortfeasor's payment and cited the case of *Tate v. Secura Insurance*¹⁰¹ in support. However, it is likely the court intended the set-off prohibition would apply only to policies issued prior to January 1, 1988. For policies issued after January 1, 1988, the set-off of the payments received by insureds should be permitted.¹⁰²

5. *Set-Off*.—Another case discussing an insurer's ability to set-off payments to an insured was *Hardiman v. Governmental Interinsurance Exchange*.¹⁰³ In *Hardiman*, the court discussed whether a carrier could set-off worker's compensation payments made to the insured from the total of uninsured/underinsured motorists coverage.¹⁰⁴

After reviewing the issue in some detail, the court ultimately concluded the insurer could set-off from the underinsured motorists benefits available the total worker's compensation payments received by the insured.¹⁰⁵ Because the intent of the uninsured/underinsured statute was to provide a minimum amount of compensation to injured insureds, the purpose of the statute would be fulfilled when the insured received worker's compensation payments. Consequently, because the insured stood to be compensated by the minimum amount, the statute was satisfied, whether the payments came from worker's compensation or uninsured motorist insurance.

99. *American Economy*, 593 N.E.2d at 1245; Conway, 779 F. Supp. at 968.

100. *American Economy*, 593 N.E.2d at 1246-47.

101. 587 N.E.2d 665 (Ind. 1992).

102. State law clearly permits the set-off:

The maximum amount payable for bodily injury under uninsured or underinsured motorist coverage is the lesser of:

(1) the difference between:

(A) the amount paid in damages to the insured by or for any person or organization who may be liable for the insured's bodily injury; and

(B) the per person limit of uninsured or underinsured motorist coverage provided in the insured's policy; or

(2) the difference between:

(A) the total amount of damages incurred by the insured; and

(B) the amount paid by or for any person or organization liable for the insured's bodily injury.

IND. CODE § 27-7-5-5(c) (Supp. 1992).

103. 588 N.E.2d 1331 (Ind. Ct. App. 1992).

104. *Id.* at 1332-34.

105. *Id.* at 1334-35.

Recent Employment Law Decisions of the Seventh Circuit and the Indiana Courts

TERRY A. BETHEL*

INTRODUCTION

A vast array of legal actions affect the employment relationship. On the federal level, the courts review decisions of such administrative agencies as the National Labor Relations Board (NLRB) and the Occupational Safety and Health Review Commission (OSHRC). The courts decide discrimination cases filed under such statutes as the Civil Rights Act of 1964 and the Age Discrimination in Employment Act, and they protect statutory rights granted by such legislative enactments as the Employee Retirement Income Security Act (ERISA). State courts, too, move in a significant number of areas that touch the relationship between employer and employee. They hear cases involving state and local employees, worker's compensation claims, and common law actions under various wrongful discharge theories. No survey of this short length could comprehensively review each decision from the state courts and the federal courts that cover Indiana. What follows, then, is not an exhaustive accounting of everything the courts accomplished during 1992, but a sampling of their more important and interesting actions.

I. INDIANA CASES

A. *Employment Evaluations*

In *Bals v. Verduzco*,¹ the Indiana Supreme Court opened the door for defamation actions based on information contained in intracompany employee evaluations. The Inland Steel Company terminated Bals following a series of negative evaluations by his supervisor, Verduzco. Bals then filed suit, arguing both defamation and interference with an employment relationship. The trial court granted summary judgment on the latter claim (an action not contested before the supreme court), but allowed the defamation action to proceed to trial. However, the trial court granted judgment for the defendant at the close of plaintiff's case,

* Professor of Law and Ira C. Batman Faculty Fellow, Indiana University School of Law—Bloomington. The author expresses his appreciation to Dirck Stahl, class of 1993, for his research assistance in the preparation of this Article.

1. 600 N.E.2d 1353 (Ind. 1992).

deciding that an intracompany evaluation was not the kind of publication that would support a defamation action. The court of appeals affirmed.²

The supreme court noted the conflict that exists among jurisdictions over this issue. Some states refuse to view intracorporate communications as a publication, reasoning that the corporation is merely communicating with itself. Others, however, overlook the fiction of a single corporate personality and recognize that corporate officers "remain individuals with . . . opinions that might be affected just as surely as those of other employees by the spread of injurious falsehoods."³ The court aligned Indiana with these states.

Interestingly, the court found support for its position in the Indiana Constitution, which provides that "every person" shall have a remedy for injury "to him in his person, property, or reputation."⁴ The court said there was no counterpart to this protection in the federal constitution.⁵ Also influential was another provision of the Indiana Constitution that protects the right of free speech, but mandates accountability for those who abuse it.⁶ Most persuasive, however, was the court's forthright recognition of an employee's interest in his or her reputation, especially in the work place:

Upon employment, an individual does not relinquish the value of a good reputation. To the contrary, a person's suitability for continued employment and advancement at work may be substantially influenced by the reputation one earns. When intracompany communications injure an employee's occupational reputation, the result may be among the most injurious of defamations.⁷

Although this decision clears the way for employee actions against superiors—and presumably against corporate employers—for falsehoods in evaluations, the path is not entirely unobstructed. The court recognized that a qualified privilege attaches "to protect personnel evaluation information communicated in good faith."⁸ This substantially tempers the likelihood of liability, because such reports will be privileged unless

2. 564 N.E.2d 307, 309 (Ind. Ct. App. 1990).

3. *Bals*, 600 N.E.2d at 1355. The court said this approach was consistent with the RESTATEMENT (SECOND) OF TORTS § 577 (1977).

4. *Bals*, 600 N.E.2d at 1355 (quoting IND. CONST. art. I, § 12).

5. *Id.*

6. "No law shall be passed restraining the free interchange of thought and opinion, or restricting the right to speak, write or print freely on any subject whatever: but for abuse of that right, every person shall be responsible." IND. CONST. art. I, § 9.

7. *Bals*, 600 N.E.2d at 1355.

8. *Id.* at 1356.

motivated primarily by ill will, publicized excessively, or made without belief or without grounds for belief in their truth.⁹ Nevertheless, *Bals v. Verduzco* is a warning to employers that evaluations and other personnel reports must be supportable by facts and cannot be used by superiors for vindictive purposes.

B. Wrongful Discharge

Although not actually an employment case, *Keystone Carbon Co. v. Black*¹⁰ is an important case for those who work as independent contractors under agency agreements and, by analogy, perhaps to employees as well. Lowell Black had been a manufacturer's representative for the defendant Keystone for twenty-nine years. He was Keystone's exclusive sales representative in Indiana and Kentucky. Beginning in the mid-1980s, Black developed a substantial account for Keystone's product with General Electric's Louisville facility.¹¹ Although sales of Keystone's products were expected to be flat in 1986, Black's sales were expected to increase, largely due to the G.E. account.

Keystone terminated Black's agency agreement in March 1986, relying on a provision of the contract that allowed either party to do so "for any reason" upon sixty days notice. Although Keystone alleged that it terminated Black because of the need to reduce expenses, it admitted that Black worked solely on commission and did not receive expense payments. Moreover, Keystone replaced Black with the son of a corporate executive and paid him expenses, salary, and commission.

Black filed suit claiming that the termination was in bad faith and had cost him approximately \$350,000 in commissions over four years. He recovered \$160,000 in a jury verdict and Keystone appealed, contending that Indiana law does not recognize a cause of action for wrongful termination of an at will agency agreement.

Although the court of appeals did not say so expressly, Black had apparently based his action on the court's 1975 opinion in *Montgomery Ward and Co. v. Tackett*.¹² In any event, most of the opinion in *Keystone* attempts to recast what the court had said in *Tackett*. Like *Keystone*, the *Tackett* case involved the termination of an agency relationship, though unlike *Keystone*, the agency agreement in *Tackett* did not allow

9. Bals was unable to overcome the defense of qualified privilege. Although he alleged that Verduzco's reports were made without belief or without grounds for belief in their truth, the court said that he had failed to present any evidence to support those allegations. *Id.* at 1357.

10. 599 N.E.2d 213 (Ind. Ct. App. 1992)

11. At least by 1986, G.E. was expected to be among Keystone's 10 largest customers. *Id.* at 215.

12. 323 N.E.2d 242 (1975).

termination for any reason. Rather, Montgomery Ward had the right to terminate its agency agreement with the Tacketts if they failed to follow "current policies and procedures," a provision Ward claimed the right to invoke because the Tacketts had submitted incorrect inventory clearance documents. Ward, in fact, recovered a judgment for Tackett's failure to pay for merchandise received.

Nevertheless, the court said in *Tackett* that a "principal owes the agent the obligation of exercising good faith in the incidents of their relationship . . . [and] a contract of agency carries an implied obligation of the principal to do nothing to thwart the effectiveness of the agent."¹³ The court found there was evidence that Montgomery Ward had failed to exercise good faith in resolving problems in the relationship between the parties.¹⁴ Montgomery Ward, however, argued that even if a principal could be liable for revoking an agency, the contract at issue did not give either side the "absolute right" to continue the relationship. In particular, the agency was terminable for Tackett's failure to follow proper procedures.¹⁵

The court's reaction to this argument gave hope to disappointed agents such as Black:

In no respect do we question the validity of the terms governing termination of the franchise agreement. However, we do not believe it consistent with sound public policy to permit Ward to employ those provisions as a shield against liability for termination accomplished in breach of its duty to exercise good faith.¹⁶

Although not a typical employment case, this sounded remarkably like the public policy exception to the employment at will rule, largely spurned by the Indiana courts.¹⁷

In *Keystone*, the court took it all back. It acknowledged that its opinion in *Tackett* had created "confusion" and that the opinion could

13. *Id.* at 246.

14. *Id.* at 245. Tackett did not deny that he had claimed credit improperly, but he alleged that his actions were motivated by inaction on Ward's part in resolving certain payment difficulties.

15. *Id.* at 246.

16. *Id.* at 247.

17. *See, e.g.,* *Sheets v. Teddy's Frosted Foods*, 427 A.2d 385, 387 (Conn. 1980) ("It would be difficult to maintain that the right to discharge an employee hired at will is so fundamentally different from other contract rights that its exercise is never subject to judicial scrutiny regardless of how outrageous, how violative of public policy, the employer's conduct may be.").

The Indiana Supreme Court has embraced the public policy exception only in limited circumstances; *see, e.g.,* *McClanahan v. Remington Freight Lines*, 517 N.E.2d 390 (1988).

be read to sanction an action like the one brought by Black. However, the Indiana Supreme Court had made it clear that “an ‘at will’ agency contract may be terminated without cause or regardless of bad faith.”¹⁸ The court said its decision in *Tackett* was actually a holding that Montgomery Ward’s termination for the audit discrepancies was “pre-textual,” an odd characterization given the fact that the jury had upheld Ward’s claim against the Tacketts.¹⁹ It seems more likely that the *Tackett* court had meant just what it said: notwithstanding Ward’s right to terminate the agreement, it still owed its agent the obligation of good faith.

After *Keystone*, no such obligation can be implied. “When the rights of the parties are controlled by an express contract, recovery cannot be based on a theory implied in law.”²⁰ This case not only frustrates the expectations of agents like Black, it further demonstrates the resolve of the Indiana courts to rebuff efforts to impose good faith obligations on employers who hold their employees to at will relationships.

The court of appeals demonstrated similar dedication to the employment-at-will doctrine in *Griffin v. Elkhart General Hospital, Inc.*²¹ The hospital employed plaintiff as a construction manager under a written agreement which provided, in part:

- a) The position, as we discussed, is projected to enjoy a duration of approximately three years. I am unable to guarantee a specific timeframe for the position, nor to predict a precise termination point.
- b) Your ability to maintain this position will, as with all positions at EGH, be predicated on your performance in this new capacity.²²

The hospital terminated the plaintiff nine months later. Griffin sued, claiming a violation of the written agreement, as supplemented by oral assurances from a vice president.²³ The trial court granted summary judgment for defendant and plaintiff appealed.

Even if the court had treated the oral assurances as a guarantee of employment for a specific term, they probably would not have survived the statute of frauds. Even so, the court might have constructed similar

18. *Keystone Carbon Co. v. Black*, 599 N.E.2d 213, 216 (Ind. Ct. App. 1992).

19. *Id.*

20. *Id.*

21. 585 N.E.2d 723 (Ind. Ct. App. 1992).

22. *Id.* at 724.

23. The plaintiff testified in a deposition that the vice president told him he would be employed for three years “no problem” and that his term of employment could have “lasted longer, 10 years, 12 years.” *Id.* at 725.

guarantees out of the contract portions reprinted above. Thus, although the employer was unwilling to guarantee a specific term of employment, it contracted to employ plaintiff for the duration of the building project, which had a termination point that can be objectively ascertained. Thus, the contract did not create the open-ended relationship to which the employment at will rules typically apply.

The court noted that at least one other state had used similar reasoning to circumvent the harshness of the rule,²⁴ but it eschewed any such innovation in Indiana. Instead, relying on ample precedent from both its own opinions and those of the supreme court, the court declared that only agreements for a definite term escape the at-will doctrine.²⁵ Tying plaintiff's employment to the completion of the construction project did not satisfy the definite term requirement.²⁶

C. Collateral Estoppel

During 1992, Indiana courts also struggled with issues that have often confronted—and confounded—the United States Supreme Court. In *Commissioner of Labor v. Talbert Manufacturing Co.*,²⁷ the Commissioner filed an action on behalf of an employee named Bougher who claimed that Talbert had discharged him in retaliation for filing an Indiana Occupational Safety and Health Aact (IOSHA)²⁸ complaint. While the lawsuit was pending, the employer and union arbitrated a contractual claim based on the same facts under the collective bargaining agreement that covered Bougher. The arbitrator found no merit in the grievance. Subsequently, the trial court granted the employer's motion for summary judgment, ruling that the arbitrator's decision precluded further litigation under the doctrines of res judicata and collateral estoppel.²⁹

A divided court of appeals reversed.³⁰ The majority (Judges Staton and Hoffman) took refuge in a series of United States Supreme Court

24. *Whitlock v. Haney Seed Co.*, 715 P.2d 1017 (Idaho 1986).

25. *Griffin*, 585 N.E.2d at 724.

26. The court of appeals also displayed a similar disposition to reject any erosion of traditional at will employment rules in more traditional employment actions. In *Mehling v. Dubois County Farm Bureau*, 601 N.E.2d 5 (Ind. Ct. App. 1992), the court reiterated the rule that Indiana does not recognize a covenant of good faith and fair dealing in employment contracts, and advised potential plaintiffs to address for reform to the legislature or the supreme court. In *Wheeler v. Balemaster*, 601 N.E.2d 447 (Ind. Ct. App. 1992), the court adhered to the notion that employers in at will relationships are free to change the terms of employment unilaterally, leaving employees with the dubious alternatives of quitting or accepting the changes.

27. 593 N.E.2d 1229 (Ind. Ct. App. 1992).

28. See IND. CODE § 22-8-1.1-38.1 (1988).

29. *Talbert*, 593 F.2d at 1230.

30. *Id.*

opinions that had considered similar issues, and one Seventh Circuit case decided on virtually identical facts. The starting point was the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*,³¹ in which an employee lost an arbitration while a claim on the same facts was under investigation by the Equal Employment Opportunity Commission (EEOC). The employee filed suit in federal court, claiming a violation of his rights under Title VII of the Civil Rights Act of 1964.³²

As in *Talbert*, the employer claimed that the prior arbitration award should have preclusive effect, a position that found support among established federal law. The Supreme Court disagreed, noting the distinction between the contractual rights enforced in arbitration and the statutory rights protected by Title VII. The Court also questioned whether arbitrators were expert in such questions of law and whether the informal procedures of arbitration would adequately protect a plaintiff's statutory rights.³³ These same themes were repeated in two subsequent decisions, which again pitted arbitration decisions against attempts to enforce statutory rights judicially.³⁴

The Seventh Circuit decision is *Marshall v. N.L. Industries*,³⁵ in which an employee filed an Occupational Safety and Health Act (OSHA) complaint following his discharge for refusing to work in conditions he believed to be unsafe. After an arbitrator had denied a similar claim under the collective bargaining agreement, the Secretary of Labor filed suit seeking, among other things, the employee's reinstatement. Relying on *Gardner-Denver*, the Seventh Circuit said that occupational safety and health legislation was intended to create individual rights broader than those protected by a collective bargaining agreement. Thus, the court refused to give preclusive effect to the arbitration.

Those same observations were apt in *Talbert*. The Indiana Court of Appeals was comfortably within the universe of federal cases dealing with the same issue when it said "the rights afforded by the statute are designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination."³⁶ That does not mean, however, that its decision is free from controversy, as Judge Sullivan pointed out in a long and thoughtful dissenting opinion.

What made the case difficult was not what the Supreme Court had said in *Gardner-Denver* and like cases. Rather, the controversy arose

31. 415 U.S. 36 (1974).

32. Codified at 42 U.S.C. § 2000e-1 to -17 (1988).

33. *Alexander*, 415 U.S. at 56.

34. See *McDonald v. City of W. Branch*, 466 U.S. 284 (1984); *Barrantine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728 (1981).

35. 618 F.2d 1220 (7th Cir. 1980).

36. *Commissioner of Labor v. Talbert Mfg. Co.*, 593 N.E.2d 1229, 1232 (Ind. Ct. App. 1992).

from what the Court said in 1991, in its opinion in *Gilmer v. Interstate/Johnson Lane Corp.*³⁷ There, the Court enforced the provisions of an individual employment agreement that required an employee to submit his age discrimination claim to arbitration rather than taking it to federal court. Although the Age Discrimination in Employment Act was intended by Congress to further important social goals, those goals were not undermined by enforcing an agreement to arbitrate the claim.³⁸ The Federal Arbitration Act demonstrated the importance of the arbitral forum and was a congressional attempt to ease the traditional hostility of the judiciary toward arbitration.³⁹

Certainly, there are differences between the kinds of arbitration at issue in *Gardner-Denver* and *Gilmer*. *Gardner-Denver* involved arbitration under a collective bargaining agreement, in which arbitrators are assumed to be expert in the enforcement of contract rights implemented by majority rule. Labor contracts commonly exclude arbitrators from construing the law or relying on what the Supreme Court has characterized as their "own brand of industrial justice."⁴⁰ By contrast, the *Gilmer* arbitration was to be convened under the Federal Arbitration Act, which does not apply to labor arbitration. Moreover, unlike the situation in *Gardner-Denver*, in which the employee was not actually a party to the arbitration, the employee in *Gilmer* had expressly agreed to submit his statutory claim to an arbitrator.

These were the distinctions drawn by the Supreme Court in *Gilmer*, in which the employee had argued that it made no sense to force him to arbitrate a claim when, under *Gardner-Denver*, the arbitration would not preclude further federal court litigation. The Court, however, distinguished labor arbitration and pointed to the federal policy favoring arbitration of statutory claims represented by the Federal Arbitration Act.

In his dissenting opinion, Judge Sullivan had the courage to say what the Supreme Court has yet to admit—that cases like *Gardner-Denver* and *Barrantine v. Arkansas-Best Freight Systems, Inc.*,⁴¹ represent a "rationale [that] can be described as a basic distrust of the arbitration system and a strong preference for judicial resolution of statutory claims."⁴² Judge Sullivan noted that the Indiana Supreme Court, which has recently

37. 111 S. Ct. 1647 (1991).

38. *Id.* at 1653.

39. *Id.*

40. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

41. 450 U.S. 728 (1981).

42. *Commissioners of Labor v. Talbert Mfg. Co.*, 593 N.E.2d 1229, 1234 (Ind. Ct. App. 1992).

adopted Rules for Alternative Dispute Resolution, observed in the preamble to those rules that “[t]he interests of the parties can be preserved in settings other than the traditional judicial dispute resolution method.”⁴³ That recognition, he said, should dispel the fears of “inadequacy or unfairness” that influenced decisions like *Gardner-Denver*.⁴⁴

Judge Sullivan is surely right. The Supreme Court’s characterization of labor arbitration in cases like *Gardner-Denver* is unrealistic. It ignores what labor arbitrators do and what the parties expect them to do. Moreover, it portrays the aggrieved employee as an unwilling captive of the union who is powerless to influence the course of the litigation. Although *Gilmer* arose in a different setting, it raises hope that the Supreme Court might someday substitute action for some of its favorable rhetoric about arbitration. Because state courts are not bound by *Gardner Denver* when employees seek to enforce state statutory rights, the court of appeals missed an opportunity to do the same thing in Indiana.

D. Fair Share

Another troublesome issue at both the state and federal levels has been the determination of so-called fair share fees, paid by nonmembers for the union’s representational efforts in collective bargaining and contract enforcement. Cases involving such employees have often occupied the courts’ time, as was the case in Indiana in 1992. In January, two districts of the court of appeals decided the same issues in different ways, prompting the Indiana Supreme Court to grant transfer and settle the matter.

The cases involved, among other issues, the question of how to determine what portion of a union’s expenditures are chargeable to represented nonmembers.⁴⁵ A recent United States Supreme Court decision established criteria for the assessment of a service fee on nonmember public employees.⁴⁶ The expenses must be germane to the union’s collective bargaining role, justified by the policies eliminating free riders and assuring labor peace, and they must not add significantly to the burden of free speech “inherent in the allowance of a union or agency

43. *Talbert*, 593 N.E.2d at 1234.

44. *Id.*

45. Both federal and state collective bargaining laws adopt the so-called principle of exclusive representation. Collective bargaining units are designated by naming groupings of jobs. Everyone who holds one of those jobs is in the bargaining unit and is represented for the union for purposes of collective bargaining, whether or not the employee belongs to the union. Thus, all employees benefit (or suffer) from the contracts negotiated by the union.

46. See *Lenhert v. Ferris Faculty Ass’n*, 111 S. Ct. 1950, 1959 (1991).

shop.”⁴⁷ This opinion, and others like it, have encouraged what one Supreme Court justice has characterized as “give-it-a-try litigation,”⁴⁸ prompting nonmembers (and employer dominated associations like the National Right to Work Committee) to file actions challenging virtually every expenditure the union makes.

One response by unions has been to quantify all those expenses that are *not* chargeable, often by keeping time records and other accounts of expenses incurred in activities which previous court decisions have identified as nonchargeable. Unions then subtract this amount from total expenses and assume that nonmembers have to pay their “fair share” of the remaining sum. It was this method of computation that was at issue in the two court of appeals opinions.

In *Fort Wayne Education Ass’n. v. Aldrich*,⁴⁹ the third district considered the union’s challenge to a trial court order which compelled the union to assess each member and nonmember a pro rata share of the amount actually spent on bargaining. The court of appeals rejected the trial court formula, noting that it had “consistently approved” a calculation based on union dues, “less a pro rata share of non-assessable expenses.”⁵⁰ Nine days later, the second district issued its opinion in *Albro v. Indianapolis Education Ass’n.*,⁵¹ expressly rejecting the *Aldrich* approach.

Although Judge Shields’ opinion recognized that the *Aldrich* approach was supported by precedent (indeed, the court even cited *Aldrich*), it concluded that the United States Supreme Court’s opinion in *Lenhart v. Ferris Faculty Ass’n.*⁵² compelled a different calculation.⁵³ Rather than compute non-chargeable expenses and deduct them from total expenditures, the court said the union has the burden of affirmatively proving chargeable expenses.⁵⁴ The previous methodology, the court said, “effectively shifts the burden of proof [of chargeable expenses] onto the nonunion members of the bargaining unit.”⁵⁵ An admission that certain expenses are nonchargeable does not compel a conclusion that the remaining expenditures are appropriately charged to nonmembers.

In June, the supreme court granted transfer on the consolidated *Aldrich* and *Albro* cases and adopted the *Albro* opinion authored by

47. *Id.* at 1952.

48. *Id.* at 1975 (Scalia, J., concurring in part and dissenting in part).

49. 585 N.E.2d 6 (Ind. Ct. App. 1992).

50. *Id.* at 9.

51. 585 N.E.2d 666 (Ind. Ct. App. 1992).

52. 111 S. Ct. 1950 (1991).

53. *Albro*, 585 N.E.2d at 669.

54. *Id.*

55. *Id.*

Judge Shields.⁵⁶ This action works a significant change in the methodology unions must use in order to calculate their fair share fees. In *Albro*, the court of appeals said that *Lenhert* “distilled” a standard in which the “paramount consideration . . . is whether the particular expense can be proved to be *chargeable*.”⁵⁷ In the future, unions must affirmatively prove that each expenditure satisfies the *Lenhert* criteria, a requirement that will add significantly to the union’s burden. Whether this increased standard of proof will add appreciably to the constitutional protections afforded non-member employees is debatable. It will, however, insure further litigation and more cost, thereby serving the interests of those who oppose the imposition of service fees on free riders.

E. Covenants Not to Compete

Employers sometimes add extra incentive to employee non-competition agreements by requiring the employees to repay training expenses should they quit and accept employment with a competitor. It was this kind of clause that was at issue in *Brunner v. Hand Industries, Inc.*⁵⁸ Brunner worked for a company, Hand, that performed finishing work on orthopedic appliances. The employment agreement acknowledged that because Hand had expended considerable sums in training him, Brunner would repay a portion of his training costs if he resigned within three years of employment and accepted employment with a competitor. The reimbursement amounts were set forth in a schedule in the agreement. After approximately twenty-eight months with Hand, Brunner resigned and took a job with a competitor. Hand then filed suit seeking \$20,000, the amount provided by the schedule. Hand recovered in the trial court, less a deduction for unpaid wages.⁵⁹

Because the reimbursement provisions of the contract applied only to former employees who accepted employment with a competitor, the court classified it as a covenant in restraint of trade and said it was subject to heightened scrutiny.⁶⁰ Such covenants are protected only if they reasonably protect the employer’s interest without unreasonably restricting the activities of employees.⁶¹

Although an employer has a legitimate interest in preventing an employee from exploiting confidential business information or otherwise appropriating the employer’s good will, both Indiana and other juris-

56. 594 N.E.2d 781 (Ind. 1992).

57. *Albro*, 585 N.E.2d at 670.

58. 603 N.E.2d 157 (Ind. Ct. App. 1992).

59. *Id.* at 159.

60. *Id.*

61. *Id.*

dictions have held that employees cannot be prevented from transferring to another work place skills and abilities developed with an employer.⁶² A contrary rule could seriously interfere with an employee's ability to make a living, because most employers could claim that employees perfected their skills through the work experience.

The court noted that Brunner had received short term training in polishing and finishing orthopedic appliances, a skill he no doubt honed in his twenty-eight months of employment. Even so, there was no evidence that he had access to confidential business information, such as customer lists or trade secrets.⁶³ He took nothing to the competitor, then, except his own abilities, albeit Hand had incurred the expense of perfecting them.

The court was also influenced by what appeared to be unreasonable reimbursement requirements, given Hand's wage rates. The jobs at issue were not particularly lucrative, paying between \$5.50 and \$9.50 an hour. The court said that the reimbursement levels, which ranged from \$2200 to \$20,000, could exceed an employee's actual earnings and were likely to constitute one-half to two-thirds of an employee's total pay.⁶⁴

Despite the court's discussion of the unreasonable reimbursement amounts, it is not clear that this factor was essential to its decision. The opinion appears broader in scope and seems to say that employee mobility cannot be restricted merely by transfer of job skills from one work place to another. Rather, the employee must transport something that is uniquely the employer's, like trade secrets or customer lists, before a restrictive covenant will be enforced.

II. SEVENTH CIRCUIT CASES

A. 1991 Civil Rights Act

In *Mozee v. American Commercial Marine Service Co.* (Mozee III),⁶⁵ the court considered the retroactivity of the Civil Rights Act of 1991.⁶⁶ The case at issue had been pending since 1977 and had been the subject of two previous Seventh Circuit opinions.⁶⁷ In the second opinion, *Mozee II*, the court remanded to the district court certain questions concerning

62. See, e.g., *Donahue v. Permacel Tape Corp.*, 127 N.E.2d 235 (1955).

63. *Brunner*, 603 N.E.2d at 160.

64. *Id.* at 160-61.

65. 963 F.2d 929 (7th Cir. 1992) [hereinafter *Mozee III*].

66. Pub. L. 102-166, 105 Stat. 1074.

67. *Mozee v. American Commercial Marine Serv. Co.*, 940 F.2d 1036 (7th Cir. 1991) [hereinafter *Mozee II*]; *Mozee v. Jeffboat, Inc.*, 746 F.2d 365 (7th Cir. 1984).

the plaintiffs' Title VII claims.⁶⁸ Both parties filed a petition for rehearing, and while they were pending, Congress passed the 1991 Act. The question at issue in *Mozee III* was twofold: (1) whether the 1991 Act applies retroactively on appeal, so that it might affect the court's decision in *Mozee II*; and (2) whether it applies to the issues remanded, which really means whether the Act applies retroactively to conduct or actions that predated it.

Not surprisingly, the plaintiffs contended that Congress intended the 1991 Act to be retroactive, and the defendant argued a contrary conclusion. Moreover, both pointed to various portions of the legislative history to support their contentions. The court, however, rebuffed any attempt to decide the issue on the basis of such evidence. Calling the language of the Act "hopelessly ambiguous,"⁶⁹ the court concluded "[w]hether Congress intended prospective or retroactive application of the 1991 Civil Rights Act cannot be deciphered from either the language of the statute or from the legislative history."⁷⁰ Unable to resolve the question through the statute or its history, the court turned to "judicially derived rules of construction."⁷¹

The court acknowledged that the judicial path was not free of obstructions. Until 1968, the Seventh Circuit said that the Supreme Court had always assumed statutes were to be applied prospectively. Then, in *Thorpe v. Housing Authority of Durham*,⁷² the Court applied the opposite presumption, albeit without offering much explanation for its change in direction. The Court subsequently reaffirmed its commitment to *Thorpe* in 1974,⁷³ then apparently reversed course eight years later,⁷⁴ and since then has applied one rule or the other from "two seemingly contradictory lines of cases."⁷⁵ The Seventh Circuit said its task was the difficult one of reconciling these two lines of decision "in a manner that comports with the policies underlying the need for prospective versus retroactive application."⁷⁶

The court decided that the presumption of prospective application embodied in the Supreme Court's 1988 opinion in *Bowen v. Georgetown*

68. *Mozee II*, 940 F.2d at 1055.

69. *Mozee III*, 963 F.2d at 933. The court's characterization applied to § 402(a), which provides that the Act "shall take effect upon enactment." Pub. L. No. 102-166, § 402(a).

70. *Mozee III*, 963 F.2d at 932.

71. *Id.* at 934.

72. 393 U.S. 268 (1969).

73. See *Bradley v. School Bd.*, 416 U.S. 696 (1974).

74. See *United States v. Security Indus. Bank*, 459 U.S. 70 (1982).

75. *Mozee III*, 963 F.2d at 935.

76. *Id.*

*University Hospital*⁷⁷ stated the general rule. The other line of cases, the court said, had more general applicability. After painstaking analysis of the Supreme Court's opinions, the Seventh Circuit concluded that the fairer rule "is to hold parties accountable for only those acts that were in violation of the law at the time the acts were performed."⁷⁸ The *Bowen* presumption applies, the court said, to matters of both substance and procedure, both in issues on appeal and those that were remanded to the trial court.⁷⁹ Judge Cudahy dissented, commenting that the majority's protracted analysis of Supreme Court cases was "thorough, but . . . mechanical."⁸⁰

This opinion will not end the controversy. As the Seventh Circuit recognized, numerous other courts have considered the same issue, and their conclusions diverge. Ultimately, then, the Supreme Court will have to address the matter, no doubt parsing the same opinions the Seventh Circuit struggled with in this case.⁸¹

B. *National Labor Relations Act Cases*

One of the more interesting cases from the Seventh Circuit in 1992 was Judge Posner's opinion in *Chicago Tribune v. NLRB*.⁸² The dispute involved the union's request for the names of permanent replacements hired by the employer following a strike that began in 1985. The union claimed it wanted the names in order to verify employment, so that it could determine how many places were left for strikers. The employer refused, citing a pattern of violence against the replacement workers. Instead, it offered two alternatives: giving the names to an accounting firm that could verify employment, or furnishing the union with the replacements' birthdate and a partial Social Security number. The union declined the compromise, resting its claim on a line of NLRB cases that gave it a presumptive right to such information, absent an employer showing of a "clear and present danger."⁸³

Judge Posner recognized that even the Seventh Circuit had described the Board's position as a "settled rule," but cautioned that it should not be taken literally. He characterized the union's request as nothing more than a discovery request, opined that no statute gave the union a right to the information, and said:

77. 488 U.S. 204 (1988).

78. *Mozee III*, 963 F.2d at 936.

79. *Id.* at 935-36.

80. *Id.* at 940.

81. The Court will not take on the task in *Mozee III*, having denied certiorari. *Mozee v. American Commercial Marine Serv. Co.*, 113 S. Ct. 207 (1992).

82. 965 F.2d 244 (7th Cir. 1992).

83. *Id.* at 246.

Where the Board got the idea that a union's demand for the names of replacement workers is to be handled not like any other discovery request but by placing on the company an insuperable burden of proving the union will in fact use the information to harass workers beats us.⁸⁴

Although his rhetoric is folksy, if not clever, Judge Posner's law may need some work. The union's request was not a mere discovery device. Further it is inaccurate to say that no statute entitles the union to the names of replacement workers. Although no one could presume to speak for the Board, it may have "got the idea" that the presumption ran in the union's favor from the Supreme Court and the National Labor Relations Act. In *NLRB v. Truitt Manufacturing Co.*,⁸⁵ the Supreme Court held that section 8(a)(5) of the Act requires the employer to furnish on request information that is important to the bargaining process.⁸⁶ Although the right is not without limits,⁸⁷ *Truitt* has been understood to mean that the employer has the burden of establishing that the information the union requests is privileged or irrelevant.⁸⁸

Posner does not even cite *Truitt*, the principal Supreme Court case on the subject. Rather, in mischaracterizing the tenor of the union's request, he refers only to *NLRB v. Acme Industrial Co.*,⁸⁹ which dealt with the union's right to information in contract enforcement proceedings like arbitration, where the request might be more comparable to discovery than what was at issue in *Chicago Tribune*.

The effect of *Chicago Tribune* is to hold that a union which is obligated by law to act as exclusive representative for the replacement workers is not even entitled to discover their identity. The court concluded that the union's rejection of the employer-offered alternatives "suggests" that it wanted the names to harass the workers, directly or indirectly. Perhaps, however, the union wanted the names so it could solicit membership among the replacements who became members of the bargaining unit the minute they were hired. The court is able to ignore this possibility by neatly dividing the case into two distinct components.

The last part of the opinion deals with the union's loss of majority status after the replacement workers were hired. A recent opinion of the Supreme Court refused to presume that strike replacements do not

84. *Id.* at 247.

85. 351 U.S. 149 (1956).

86. *Id.* at 155.

87. *See, e.g.*, *Detroit Edison v. N.L.R.B.*, 440 U.S. 301 (1979).

88. *See, e.g.*, JULIUS G. GETMAN & BERTRAND E. POGREBIN, *LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE* (1988).

89. 385 U.S. 432 (1967).

support the union.⁹⁰ In *Chicago Tribune* the court noted that the union's support had eroded by mid 1987, and it approved the employer's refusal to execute a contract even though it acknowledged that the union had accepted the offer.⁹¹ In doing so, Posner stepped a little clumsily over one of the Seventh Circuit's own cases,⁹² but he professed to be guided by the interests of employees.⁹³

Perhaps the union did want to harass the strike replacements; or perhaps, as the employer suggested, its only interest in the Tribune bargaining unit was the tactical advantage it might obtain for other employees working for a different newspaper. However, there is danger in allowing employers to assert the best interest of their employees, which in employers' eyes are too often tied to nonunion workplaces, exactly the outcome of this case. The replacements might have spurned the union in any event, but this decision gives the employer yet another weapon in the decertification arsenal. Not only can it hire replacement workers for economic strikers, it can now effectively deprive the union of any opportunity to contact these employees it represents, thus virtually assuring their rejection of representation in any subsequent election or poll.

Equally disturbing is Judge Posner's opinion in *Graphics Communications International Union Local 508 v. NLRB*,⁹⁴ in which the employer, Nielson Lithographing Co., had also replaced striking workers. In 1983, the company entered collective bargaining by demanding seventy-six concessions from the union that were intended to reduce labor costs. The employer said it needed the concessions "to compete," because costs were "prohibitive," and "the company is making a profit . . . [but] couldn't compete."⁹⁵ There is no mystery about why it framed its justification in this manner.

In *NLRB v. Truitt Manufacturing Co.*,⁹⁶ the employer resisted a union's wage demands by pleading that meeting them would break the company.⁹⁷ The union requested that the employer furnish information substantiating its claim, and filed a section 8(a)(5) charge when the employer refused. The Supreme Court enforced the Board's order to disclose, saying:

90. *NLRB v. Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542 (1990).

91. *Chicago Tribune v. NLRB*, 965 F.2d 244, 247-48 (7th Cir. 1992).

92. *See Continental Web Press, Inc., v. NLRB*, 742 F.2d 1087 (7th Cir. 1984).

93. *Chicago Tribune*, 965 F.2d at 250.

94. 977 F.2d 1168 (7th Cir. 1992).

95. *Id.* at 1169.

96. 351 U.S. 149 (1956).

97. *Id.* at 150.

Good faith bargaining necessarily requires that claims made by either bargainer be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some proof of its accuracy.⁹⁸

Finding an obvious parallel between the employer in *Truitt*, who had resisted a wage increase, and Nielsen Lithographing, which had asked for a decrease, the union demanded that the employer open its financial records for examination. The Seventh Circuit, for the second time in four years, found that *Truitt* had no application.⁹⁹

In a previous decision, the court had said that *Truitt* applied only in those instances in which an employer pleaded an inability to pay. Nielsen had not overstepped that line, which apparently is bright to the point of radiance. Nielsen did not say that it had to cut wages and benefits because it couldn't afford to pay them. Rather, "[a]ll that Nielsen was claiming was that if it didn't do anything about its labor costs it would continue to lose business and layoff workers. It didn't claim that it was in any financial trouble."¹⁰⁰ Part of the problem, Posner said, was that Nielsen used to enjoy a competitive advantage due to superior equipment.¹⁰¹ However, as competitors acquired the same equipment and presumably the same production efficiencies, Nielsen's comparatively higher wages put it at a disadvantage.¹⁰²

No one could doubt the competency of Nielsen's legal advice or, for that matter, the gullibility of the Seventh Circuit. Its desire to cut wages, Nielsen said, was really a desire to "protect the jobs of our employees."¹⁰³ The court swallowed this, apparently without a grimace. Relying, no doubt, on his considerable expertise in economics, Posner declared that the employer could simply "minimize its costs at a lower volume of output."¹⁰⁴ That is, rather than lose money, the employer would just control costs by cutting jobs. However, even if it got down

98. *Id.* at 152-53.

99. A full review of the case's history is beyond the scope of this Article. The Seventh Circuit had first considered that matter in 1988, following the Board's order that the employer disclose the information. The court refused to enforce, *Nielson Litho Co. v. NLRB*, 854 F.2d 1063 (7th Cir. 1988), relying on its decision in *NLRB v. Harvstone Mfg. Corp.*, 785 F.2d 570 (7th Cir. 1986). Properly chastened, the Board reversed course, 305 NLRB No. 90 (1991). The employer then sought review of the Board's decision.

100. *Graphics Communications Int'l Union v. NLRB*, 977 F.2d 1168, 1170 (7th Cir. 1992).

101. *Id.*

102. *Id.*

103. *Id.* at 1169.

104. *Id.* at 1170.

to one percent of its regular output, the firm might still be profitable, albeit fairly vacant. Whether the employer followed this course or not was none of the union's business, the court said, citing *First National Maintenance v. NLRB*.¹⁰⁵

The effect of this decision is clear. Rather than saying that continuing at the present level of operations without a wage cut could cause it to lose money, the employer said the same thing but with a different spin. It could not continue at the same level of wages without cutting employees. This, the court declared, made all the difference in the world. Because the union has no right to bargain over decisions to decrease the work force, the court decided there was no duty to furnish information about such plans. Even with such a duty, the union knew that other companies were becoming more productive, which was the real cause of Nielsen's woes. One must wonder whether any employer will ever again be so foolish as to plead inability to pay. Now employers can avoid the effects of *Truitt* merely by professing a concern for employees' jobs rather than shareholders' profits.

Judge Posner also authored the opinion in another case involving the Chicago Tribune, *Chicago Tribune Co. v. NLRB*.¹⁰⁶ During the term of a collective bargaining agreement, the employer unilaterally adopted a drug and alcohol policy that governed employees both on and off the work place. Employees suspected of use or impairment on the job could be forced to assent to blood or urine tests. The employer claimed that its action was justified by a management's right clause that read, in pertinent part, "except as expressly limited by the express language of this agreement . . . the company has and retains exclusively to itself . . . the exclusive right . . . to establish and enforce reasonable rules and regulations relating to the operation of its facilities and to employee conduct."¹⁰⁷

Although the management rights clause was not unusual, another provision of the contract is not typically found in collective bargaining agreements, at least outside the printing industry. The parties agreed that the "general laws" of the international union would "govern relations between the parties on those subjects concerning which no provision is made in the agreement."¹⁰⁸ One such "law" provided that "[n]o journeyman shall be required to submit to a physical examination as a condition of employment."¹⁰⁹

105. 452 U.S. 666, 686 (1981) (holding that the National Labor Relations Act does not require an employer to bargain with the union representing its employees over decisions to close part of the business).

106. 974 F.2d 933 (7th Cir. 1992).

107. *Id.* at 935.

108. *Id.*

109. *Id.*

The NLRB held that unilateral implementation of the drug and alcohol rule violated section 8(a)(5).¹¹⁰ The panel majority said the requirement to submit to testing conflicted with the "law" that forbade physical examination of journeymen and was, therefore, a unilateral midterm contract modification.¹¹¹ Although employees who used drugs off the job were not subject to testing, the portion of the rule dealing with them also violated section 8(a)(5). The consequence of off duty drug use is a mandatory subject for bargaining, the Board said, and the employer could not act unilaterally without first bargaining with the union. The general language in the management rights clause was not sufficient to relinquish the union's right to bargain since it was not a clear and unmistakable waiver.¹¹²

As the Board had done as well, the Seventh Circuit debated whether drug testing was a "physical examination" within the meaning of the contract. Judge Posner had his doubts, declaring that a "physical examination" is the "ensemble" and not its separate parts, any more than part of an atom is itself an atom.¹¹³ Although such nit-picking could obviously lead to absurd results, the court seemed more interested in substance than form. Thus, Posner recognized that the "purpose" of the language was to protect jobs, not define medical procedures. As such, medical testing would presumably fit within the term "physical examination."¹¹⁴

Nevertheless, the court found the general law prohibiting physical examinations to have no application. Posner's opinion observes that the general laws apply only when a subject is not otherwise covered in the labor contract.¹¹⁵ Although there was nothing in the agreement about management's right to impose testing or otherwise regulate drug or alcohol use, the management rights clause said the employer had the "exclusive right . . . to establish and enforce reasonable rules . . . relating to . . . employee conduct."¹¹⁶ The court said it had "no doubt" that the drug and alcohol policy was such a rule.¹¹⁷

110. *Id.* at 934 (citing *Chicago Tribune Co.*, 304 N.L.R.B. No. 62, 138 L.R.R.M. (BNA) 1065 (Aug. 27, 1991)).

111. *Chicago Tribune Co.*, 304 NLRB No. 62, 138 L.R.R.M. (BNA) (Aug. 27, 1991), slip op. at 3. Although the reach of the NLRA's requirement that the parties bargain in good faith is beyond the scope of this article, the Board has held that an employer violates section 8(a)(5) when it modifies a contract unilaterally during its term. See generally GETMAN & POGREBIN, *supra* note 88, at 133-34.

112. *Chicago Tribune Co.*, 304 NLRB No. 62, 138 L.R.R.M. (BNA) 1065 (Aug. 27, 1991), slip op. at 3.

113. *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 936 (7th Cir. 1992).

114. *Id.*

115. *Id.*

116. *Id.* at 937.

117. *Id.* The court noted that the union argued to the contrary, a contention Posner

This characterization of the employer's rule effectively decided the case. The general law, the court said, was a "gap filler."¹¹⁸ However, there was no gap to be filled. The management rights clause gave the employer "carte blanche to impose rules relating to employee conduct."¹¹⁹ Because the contract specifically allowed the employer to promulgate rules, including rules requiring drug and alcohol testing, there was no occasion to apply the general law. It was preempted by the express terms of the contract.

The court also rejected the union's challenge to the off duty rules, where testing was not a factor.¹²⁰ Indeed, the rule allowed discharge of any employee arrested (not convicted) for illegal activity related to drugs and alcohol.¹²¹ Without commenting about whether this provision was reasonable, the court said that its unilateral implementation was not an unlawful refusal to bargain.¹²² It questioned the Board's assertion that waiver of a statutory right—like the right to bargain—must be "clear and unmistakable."¹²³ Even if this standard applied, however, it was satisfied.

The parties agreed to a provision that allowed the employer to promulgate reasonable rules and the language they used did not distinguish between on the job and off the job activity. Rather, they used broad language that must be interpreted in light of ordinary contract principles. There is, the court said, no rule that tilts the decision toward the union. The only question is what the contract means, a determination not necessarily within the Board's area of expertise.¹²⁴ The court held that the Board had misconstrued the contract, which it found sufficient to waive the union's right to bargain.¹²⁵

The implications of this decision are surely disturbing to unions. There was nothing very special about the management rights clause the parties negotiated. Versions of the same language appear, no doubt, in thousands of collective bargaining agreements. Even without this boilerplate, most labor professionals would concede that the employer has the right to implement reasonable rules to govern the work place. But the ordinary understanding—recognized expressly in the management

said "we barely understand." *Id.* at 935. The union's argument is not explained in the opinion.

118. *Id.*

119. *Id.* at 935.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 936.

124. *Id.* at 937.

125. *Id.*

rights clause itself—is that such general grants of authority do not override specific provisions.

The court, however, found a loophole in the specific provision at issue here. The general laws are to apply only in those instances in which the parties had not otherwise bargained language.¹²⁶ Of course, they bargained no language about either drug testing or physical examinations, both common subjects addressed in labor negotiations. All they did was agree to boilerplate that allowed the company to promulgate rules. One must question why this imprecise proclamation of a generally recognized authority should outweigh a specific restriction on the treatment of journeymen employees.

In its zeal to protect employer prerogatives, the court got it backwards. The question was not whether the restriction on examinations should apply. Rather, as the NLRB found, the issue was whether a general management rights clause repudiated a protection that the parties did not need to put in the agreement, because it was already in the general laws they had incorporated by reference.

No doubt the court was influenced by the same consideration that motivated member Oviatt to dissent from his colleagues' NLRB opinion.¹²⁷ The employer's policy is in line with the national policy against unlawful drug use. However, employers have no power to implement such policies in ways that violate employee rights bargained under the protection of federal law. Moreover, there is nothing in the court's opinion that limits it to matters of important national interests. To the contrary, Posner said the employer had *carte blanche* to implement reasonable rules, presumably no matter what the general laws provide. The rules, of course, could not violate a *specific* provision of the agreement, but following this opinion, the general laws do not constitute such provisions. They yield to the management rights clause.

The decision pays little heed to the bargaining history between the parties. One must ask, however, whether the parties deferred to the general laws when they negotiated their contract. That is, if the general laws dealt with a specific problem—physical examinations, for example—the parties may have elected to omit any such reference in the agreement itself. They had already agreed to be bound by the general laws unless the contract said otherwise. The court's opinion, however, virtually nullifies any subject in the general laws that might conceivably become a rule regulating the work place or employer conduct, a broad spectrum indeed. In that event, the management rights clause did more than give

126. *Id.* at 935.

127. Chicago Tribune Co., 304 N.L.R.B. No. 62, 138 L.R.R.M. (BNA) 1065 (Aug. 27, 1991).

the employer the right to make rules. It erased those protections the parties had negotiated but codified only in the general laws.

C. Age Discrimination Cases

Other civil rights statutes intended to protect certain classes have sometimes been interpreted to prohibit so-called reverse discrimination. Title VII of the Civil Rights Act of 1964,¹²⁸ for example, has been held applicable to suits filed by whites or by men.¹²⁹ The plaintiffs in *Hamilton v. Caterpillar, Inc.*,¹³⁰ tried unsuccessfully to raise what the court characterized as a reverse discrimination claim under the Age Discrimination in Employment Act (ADEA).¹³¹ The ADEA protects employees who are at least forty years old from discrimination.¹³² Each of the plaintiffs in *Caterpillar* was part of the protected class.¹³³ They complained that an early retirement program created to temper the effects of plant closings unlawfully excluded them, because it applied only to employees who were at least fifty years old.¹³⁴

The court tipped its hand early in the opinion when it characterized the claim as "more than a little bizarre."¹³⁵ In fact, however, the plaintiffs could rely not only on the interpretation of other statutes but also on a regulation promulgated by the Equal Employment Opportunity Commission (EEOC): "It is unlawful in situations where this Act applies, for an employer to discriminate . . . by giving preference because of age between individuals 40 and over."¹³⁶ The employer had done exactly that. The plaintiffs alleged that they had the requisite service to qualify for early retirement, but had been denied only because of their age.¹³⁷

The court noted that there was also some "arguable support" in the wording of the statute.¹³⁸ Thus, congress legislated against "arbitrary age discrimination"¹³⁹ and against a denial of employment opportunities

128. Codified at 42 U.S.C. § 2000e-a to -17 (1988).

129. *Johnson v. Transportation Agency*, 107 S. Ct. 1442 (1987).

130. 966 F.2d 1226 (7th Cir. 1992).

131. *Id.* at 1226 (citing 29 U.S.C. § 621-34 (1988)).

132. The prohibition against age discrimination is found in 29 U.S.C. § 623 (1988). The age limitation is contained in 29 U.S.C. § 631 (1988).

133. *Hamilton*, 966 F.2d at 1227.

134. *Id.*

135. *Id.*

136. 29 C.F.R. 1625.2(a) (1991). The regulation goes on to provide the following example: "[I]f two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor." *Id.*

137. *Hamilton*, 966 F.2d at 1226.

138. *Id.* at 1228.

139. 29 U.S.C. § 621(b) (1988).

or benefits "because of . . . [an] individual's age."¹⁴⁰ The court, however, found such language merely to reflect a congressional concern that "discriminating against older people on the basis of their age is arbitrary."¹⁴¹ Despite what it called the lack of "graceful" language in the statute, the court discerned no congressional intent to "open the floodgates to attacks on every retirement plan."¹⁴² Congress intended to protect "older workers," not those who were denied employment opportunities "because they were too young."¹⁴³

Although the court's decision may be justifiable, the issue is more difficult than the court's opinion indicates. No where in the brief opinion does the court confront directly the fact that the plaintiffs were part of the class the ADEA was intended to protect. To that extent, the analogy the court drew to other civil rights legislation was inapt. Thus, the court said that if Title VII expressly limited potential plaintiffs to women and minorities, a court could not read it to authorize actions by men or by whites. That is, no reverse discrimination actions would be possible. The ADEA, the court noted, limited its protection to those age forty or older.¹⁴⁴ From this the court concluded that there was no congressional intent to provide protection for younger workers:

There is nothing to suggest that Congress believed age to be the equal of youth in the sense that the races and sexes are deemed equal If the Act were really meant to prevent reverse age discrimination, limiting the protected classes to those 40 and above would make little sense.¹⁴⁵

The difficulty with this analysis is the court's characterization of the plaintiffs' claim as one of reverse discrimination.¹⁴⁶ Typically that label has been applied to cases in which a majority member of a class is disadvantaged by efforts to protect or promote minority members. In such cases, the term "reverse discrimination" recognizes that even though the plaintiff is not a member of the class the legislation was intended to benefit, he or she may nonetheless suffer when decisions are made on the basis of some prohibited factor. This was not true in *Caterpillar*. Judge Cudahy wrote the opinion as if the plaintiffs were outside the protection of the Act; as though a group of thirty-something

140. *Id.* § 623 (1988).

141. *Hamilton*, 966 F.2d at 1228.

142. *Id.*

143. *Id.*

144. *Id.* at 1226.

145. *Id.* at 1227.

146. *Id.*

yuppies was whining about exclusion from the retirement plan. *That* would have been a claim of reverse discrimination.

The court's conclusion that the ADEA evidences no intent to protect young workers may be correct, but it has no application whatever to the case the court decided. The plaintiffs, in fact, were members of the protected class and their allegation was that they were excluded from benefits solely on the basis of their age, an assertion that would seem to have considerable merit. The issue, then, is not whether the ADEA allows reverse discrimination actions. Rather, the issue is whether the ADEA allows employers to make distinctions between members of the protected class when it allocates scarce resources on the basis of age.

Perhaps the employer's retirement plan was protected by the Act's bona fide employee benefit provision.¹⁴⁷ Perhaps some provision of the ADEA allows such distinctions. Although what happened to plaintiffs seems unfair, it is not easy to distinguish their action from one attacking *any* retirement plan, which typically impose minimum age limits on retirement. Whatever the justification, little can be said in defense of the court's opinion. It should have confronted the issue before it rather than pretending that the plaintiffs were somehow excluded from the rights Congress expressly gave them.

Another questionable age discrimination case is *Finnegan v. Trans World Airlines*,¹⁴⁸ in which the court found the disparate impact theory inapplicable to a benefit reduction that fell most heavily on older workers. In response to heavy losses, TWA cut benefits of nonunion workers by reducing wages fourteen percent and by capping vacations at four weeks.¹⁴⁹ Before this change workers with at least sixteen years service were apparently entitled to more than four weeks, up to a high of seven weeks after thirty years service. Most employees with more than sixteen years employment, and all of those who had worked for TWA more than thirty years, were within the class of workers protected by the ADEA.¹⁵⁰ Although the opinion does not fully recite the effects of the reduction, apparently no employee with fewer than sixteen years of service had her vacation reduced. Thus, employees with two or three weeks vacation were not affected by the change.

Although the plaintiffs, all employees age forty or older, tendered a claim of disparate treatment,¹⁵¹ their primary contention was grounded

147. 29 U.S.C. § 623(f) (1988).

148. 967 F.2d 1161 (7th Cir. 1992).

149. *Id.* at 1161.

150. *Id.*

151. The employer had an early retirement plan available to older workers and plaintiffs urged that the vacation reduction was intended to goad employees into accepting

in disparate impact theory, defined adeptly by Judge Posner as follows: "[I]f an employment practice bears disproportionately against the members of a protected group, the employer ought to be required to justify it."¹⁵² Obviously, the reduction in vacation benefits fell most heavily—perhaps almost exclusively—on older workers, because they were the ones most likely to have long service. The district court granted summary judgment, holding that any disparate impact was justified by section 4(f)(2) of the ADEA,¹⁵³ which shields the impact of bona fide seniority systems or bona fide employee benefit plans.

In dicta, the court opined that section 4(f)(2) was inapplicable.¹⁵⁴ It questioned whether the seniority provision had any application to the action at issue, and it noted that even TWA did not argue that the reductions were protected as part of a benefit plan.¹⁵⁵ These observations were dicta, however, because the court said that disparate impact theory did not apply to the case at all.¹⁵⁶ Indeed, the court even questioned whether disparate impact theory applied under the ADEA, though it recognized that the "weight of authority" was to the contrary.¹⁵⁷ Even if it applies, however, the court said the case "makes no sense in disparate impact terms."¹⁵⁸

Disparate impact theory, the court said, was intended to force employers to justify a facially neutral employment practice that adversely affected a protected group.¹⁵⁹ Such theories could not be applied to benefit reductions, where virtually any reduction would affect older employees more severely than their younger counterparts.¹⁶⁰ Across the board wage decreases, for example, would likely affect older workers more because their wages are probably higher; reductions in dental insurance would similarly fall on older employees because their teeth are probably worse.¹⁶¹ Nor could a benefit like vacation be reduced

that option. Judge Posner said this theory was "implausibly Machiavellian." *Id.* at 1165. Without the benefit of any evidence (the trial court had granted summary judgment) about the value employees placed on extended vacation opportunities, the court said the employer's action was "not likely" to influence employees to retire. *Id.* Judge Posner's opinion also questions whether the plaintiffs had sufficient evidence to prove illicit motive, a matter that might also have been illuminated by a trial. *Id.*

152. *Id.* at 1163.

153. 29 U.S.C. § 623(f)(2) (1988).

154. *Finnegan*, 967 F.2d at 1163.

155. *Id.* at 1162.

156. *Id.* at 1163.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 1164.

proportionately. A three-sevenths reduction in the two week vacation of a younger employee would leave her with only six days, which would make it difficult for the employer to retain its workforce.¹⁶² (The court did not explain how it arrived at this factual finding in the absence of any evidence.) Four weeks vacation, on the other hand, was "generous" and apparently unlikely to discourage senior employees.¹⁶³ There was simply no way to "maintain a rational system of paid vacations" without cutting senior employees more than junior ones.¹⁶⁴

Disparate impact, the court explained, was intended to remove discriminatory policies that had developed from "inertia or insensitivity."¹⁶⁵ The theory also helped to ferret out practices that had been adopted originally in support of intentional discrimination.¹⁶⁶ These situations, however, were a "far cry" from that faced by the court.¹⁶⁷ Though TWA's benefit reduction fell more heavily on older workers, it was not the result of insensitivity or a remnant of previous discrimination.¹⁶⁸ Rather, it was simply not possible to cut vacation benefits without forcing older workers to bear the brunt of the reduction.¹⁶⁹ Any other result would force the company to "balance its books on the backs of the younger workers."¹⁷⁰

One might question the court's gloomy assessment of the effect of a proportional reduction on younger employees. One might even suggest that if the employer is put to a choice between hurting the young or the old, Congress has mandated that the old should be protected. In any event, the court should at least have been honest in its assessment of the issue. The arguments supporting the employer's position sound more like a business justification for adverse impact than an argument that the theory simply doesn't apply. The court may have thought so too.

Judge Posner acknowledged that the court could have found an adverse impact with compelling business justification but that "would mean that every time an employer made an across the board cut in wages he was *prima facie* violating the age discrimination law."¹⁷¹ That is, if disparate impact theory applied to benefit reductions, employers

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1165.

171. *Id.*

might be forced to prove they were justified. The court, at least, was forthright about this unabashed deference to employer prerogatives.

Although only a preliminary opinion, *Fisher v. Transco Services-Milwaukee*¹⁷² might serve as a warning to employers who plan to implement standardized productivity measurements that adversely affect older workers. The case arose after Transco instituted a computerized "Measured Day Work Program," which measured the performance of certain employees. The program evaluated the time it took for these employees to complete certain work tasks and compared it to computer generated standards. Those who fell within the bottom twenty percent of the measured group (which included fifty-two employees) were subject to a progressive discipline scheme that culminated in discharge. The two plaintiffs, both in their forties, were among eleven employees fired during the forty-eight week duration of the program. Ten of the eleven terminated workers were age forty or older.

Plaintiffs claimed discrimination under both disparate treatment and disparate impact theories, but the trial court granted summary judgment for the defendant.¹⁷³ The court of appeals first considered the case under disparate treatment, holding that plaintiffs had created a genuine issue of material fact about whether the program was a pretext for age discrimination.¹⁷⁴ Of more interest is the disparate impact theory, which the court noted was "the least developed aspect of the case."¹⁷⁵

Although the program was facially neutral, plaintiffs claimed that it affected older workers more harshly than others, pointing to the fact that ten of the eleven employees fired under the program were over forty. While it recognized the difficulty of generalizing from such small statistical samples, the court observed that when ten of twenty-seven older workers were terminated, as compared to only one of twenty-five younger workers, "it does not require expertise in differential equations to observe that an adverse ratio of ten to one is disproportionate."¹⁷⁶ This discrepancy created a material issue of fact that will have to be "fully developed at trial."¹⁷⁷ Similarly, the court said there was a material issue about whether the program, whose administration had been replete with errors and which had been abandoned after forty-eight weeks, was a business necessity sufficient to overcome the adverse impact.¹⁷⁸

172. 979 F.2d 1239 (7th Cir. 1992).

173. *Id.* at 1239.

174. *Id.* at 1244.

175. *Id.*

176. *Id.* at 1245.

177. *Id.*

178. *Id.*

Whether or not plaintiffs marshal sufficient evidence to prevail at their new trial, this decision signals the court's willingness to evaluate the effect of productivity devices, and perhaps new technology and new work patterns, on older workers. The plaintiffs in *Transco* were only forty-two and forty-five at the time of their discharge. Suppose, however, they had been sixty-five or older. Can an employer standardize productivity requirements based on the abilities of younger workers or must it accommodate those who cannot keep pace due to age? Similar issues arise under some cooperative ventures where employees are expected to perform a range of duties which had previously been allocated to separate classifications. If an older worker can perform some, but not all of these functions, can she be terminated?

Transco does not answer these questions. It counsels caution, however, for employers who would standardize requirements without regard to how the abilities of their employees are affected by such factors as age and disability.

D. Title VII

*American Federation of State, County, and Municipal Employees v. Ward*¹⁷⁹ grew out of the Illinois Department of Employment Security's decision to lay off employees by concentrating the impact in offices heavily populated by blacks. An internal adverse impact analysis demonstrated that, by focusing the layoffs on Chicago area offices, 8.6% of the department's black workers were laid off, compared to only 3% of its white employees.¹⁸⁰ This was sufficient to trigger the EEOC's so-called four-fifths standard, which questions selection procedures that produce discrepancies between blacks and whites of greater than one-fifth.¹⁸¹ The department reacted by calculating the effect of the layoff on the rate of retention by race, instead of the rate of layoff. As the court observed, this "number juggling" had no real effect on the layoff, but it did avoid the four-fifths rule.¹⁸²

The employees' union and a separate class of black employees sued, claiming intentional discrimination under Title VII,¹⁸³ under § 1981,¹⁸⁴

179. 978 F.2d 373 (7th Cir. 1992).

180. *Id.* at 375.

181. 29 C.F.R. § 1607 (1991).

182. *Ward*, 978 F.2d at 375. Under a layoff analysis, 3% of white employees were laid off, as compared to 8.6% of black employees, meaning that the number of white employees accounted for only 35% of the layoff. Under a retention analysis, black employees were retained at 94% of the rate of white employees. *Id.*

183. 42 U.S.C. § 2000e to 2000e-17 (1988).

184. *Id.* § 1981.

and under § 1983.¹⁸⁵ The plaintiffs' Title VII claim also asserted that the layoff procedure had an adverse impact on black employees. The district court dismissed the claim of intentional discrimination, holding the plaintiffs had failed to allege "well pleaded facts that would give rise to an inference" of intentional discrimination.¹⁸⁶ The case then proceeded on the disparate impact theory with the trial court ultimately granting summary judgment for defendants.¹⁸⁷ The court found that plaintiffs had failed to identify a "specific employment practice" that produced an adverse impact.¹⁸⁸ Such a practice, the trial court said, must be a "repeated, customary method of operation," a definition the protested layoff could not satisfy.¹⁸⁹

The Seventh Circuit reversed the trial court on both issues. It did not dawdle over the disparate treatment theory, observing simply that the Federal Rules of Civil Procedure require only a "short and plain statement" of the claim.¹⁹⁰ An identification of the protested layoffs and an allegation that the defendants had acted "knowingly, intentionally, and maliciously" was sufficient.¹⁹¹ The court then turned to the disparate impact theory where, it noted, there is "precious little case law on the meaning of employment practice."¹⁹²

Title VII outlaws any "employment practice" that discriminates on the basis of race.¹⁹³ Since the Supreme Court's opinion in *Griggs v. Duke Power*,¹⁹⁴ plaintiffs have been able to claim discrimination regardless of an employer's intent by alleging that an employment practice adversely affects a member of a protected class. The court observed that the "enumerated acts" of Title VII ("to hire . . . to discharge . . . or otherwise to discriminate against"¹⁹⁵ or "to limit, segregate or classify"¹⁹⁶) were employment practices, as that term was used in the statute, and most of them could be referred to as "single decisions of an employer."¹⁹⁷ Each of those single decisions would support a claim of intentional

185. *Id.* § 1983.

186. *Ward*, 978 F.2d at 376.

187. *Id.*

188. *American Fed'n. of State, County, and Mun. Employees v. Ward*, 771 F. Supp. 247, 251 (N.D. Ill. 1991).

189. *Id.*

190. *Ward*, 978 F.2d at 376-77 (quoting FED. R. CIV. P. 8(a)(2)).

191. *Id.* at 377.

192. *Id.*

193. 42 U.S.C. § 2000e-2(a) (1988).

194. 401 U.S. 424 (1971).

195. 42 U.S.C. § 2000e-2(a)(1) (1988).

196. *Id.* § 2000e-2(a)(2).

197. *American Fed'n of State, County, & Mun. Employees v. Ward*, 978 F.2d 373, 377 (7th Cir. 1992).

discrimination and "it is difficult to see why the result should be any different when the decision is challenged on the grounds of adverse impact."¹⁹⁸

The court said the trial court had apparently confused adverse impact theory with the "pattern or practice" cases that allow civil enforcement suits by the attorney general.¹⁹⁹ Such cases, which require proof that an employer "regularly and purposefully discriminates against a protected group," demonstrate a method of proving intentional discrimination.²⁰⁰ Once the government makes a prima facie case, the burden shifts to the employer to show that it did not discriminate against a particular employee.²⁰¹ This, the court said, was to be distinguished from proof of an unlawful employment practice by adverse impact theory.²⁰²

The court turned to what was undoubtedly the defendant's principal concern. Previous adverse impact cases had largely been like *Griggs*, in which an employer's work policies (e.g., the requirement that all employees have a high school diploma) have the effect of excluding more black employees than white employees. Such practices, which apply neutrally to all employees regardless of race, might nonetheless produce a discriminatory impact. The single layoff decision in *Ward*, however, was not necessarily reflective of an employment policy. It was an isolated decision that just happened to hurt blacks more than whites. The defendant's obvious fear, no doubt shared generally by employers, is the extension of disparate impact to single employment decisions.

The discharge of a single employee who happens to be black, for example, might produce an adverse impact. Similarly, an employer's decision to eliminate a product line or close a plant might affect more black workers than white workers. Such single decisions, however, would ordinarily not be the result of an employment practice applied neutrally to all employees. In the ordinary case, then, the decision could be attacked only if the plaintiff could prove some intent to discriminate.

Presumably, the court's decision does not subject each isolated decision to disparate impact analysis. Plaintiffs face significant difficulties in establishing a prima facie case of adverse impact. Some groups may be too small to yield valid statistical comparisons. Even if they do, courts must take account of "common non-discriminatory reasons for apparent disparities."²⁰³ Nevertheless, "to the extent that members of a protected class can show significant disparities stemming from a single

198. *Id.*

199. *Id.* at 378.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

decision . . . there is no reason why that decision should not be actionable.”²⁰⁴ Given the difficulties of proving intentional discrimination, one might expect that plaintiffs will seize on *Ward* as an expansion of disparate impact theory, thereby testing the trial court’s prediction that “every single act” of an employer will be reviewed for its adverse effect on protected classes.

204. *Id.*

Survey of 1992 Developments in the Indiana Law of Professional Responsibility

CHARLES M. KIDD*

INTRODUCTION

1992 was a very active year in the area of professional responsibility. In the disciplinary cases decided by the Indiana Supreme Court, three areas warrant careful evaluation by all practitioners. They are client fund conversion, restoring funds to clients, and improper courtroom behavior. These cases also demonstrate that the Rules of Professional Conduct are only the starting point for analyzing a professional responsibility issue. Precedent keeps this body of law both vital and contemporary with the needs of the profession.

I. CLIENT FUND CONVERSION

A. Background

Misappropriation of property belonging to someone else is one of the most serious violations of the Rules of Professional Conduct. The sanctions imposed by the Indiana Supreme Court for this kind of conduct are equally serious.

The methods by which lawyers convert funds are many, but there are three common avenues:

(1) The lawyer misappropriates assets from an estate in which he is either lawyer or personal representative or both,

(2) The lawyer holds monies with the client's permission (often in the form of a retainer or settlement proceeds) and begins using the funds for personal purposes, and

(3) The lawyer commingles his own funds with those of a client in a bank account and draws on the account until the balance drops below the minimum balance for the client's money. For example, assume a lawyer's trust account has an existing balance of \$500 and a client gives the lawyer a \$500 retainer. If the lawyer immediately writes a check for \$800 he has technically converted \$300 of client funds which he has yet to earn.

* Staff Attorney, Indiana Supreme Court Disciplinary Commission; J.D., 1988, Indiana University School of Law—Indianapolis.

Under the former Code of Professional Responsibility, Disciplinary Rule 1-102 prohibited, among other things, conduct involving dishonesty, fraud, deceit, or misrepresentation.¹ In years past, the conversion of client funds would, almost certainly, lead to the respondent lawyer's disbarment.²

In 1992, however, the Indiana Supreme Court handed down opinions in three cases involving client fund mishandling that differ distinctly from past sanctions for these acts. *In re Frosch*,³ *In re Jarrett*,⁴ and *In re Cawley*⁵ each involved a lawyer's misuse of client funds for personal purposes. In addition, *Cawley* involved a violation of Rule 8.4(b) of the Indiana Rules of Professional Conduct, which makes the commission of a criminal act a disciplinary offense.⁶ In each of the three cases, the sanctions were substantially less than the disbarment an offending lawyer would have expected a decade ago. It should also be noted that the standard under Rule 8.4(b) does not require the criminal conviction of the lawyer, but only the commission of the act.⁷

B. The Cases

In *Frosch* the respondent lawyer was charged with misconduct because of the way he handled funds collected on behalf of a client. Specifically, Frosch had a contingent-fee contract to pursue rent collection and eviction cases on behalf of Freeman in small claims court. A dispute arose between Frosch and his client, and Frosch was instructed to discontinue all representation on February 5, 1988. By February 20, Frosch was holding \$19,500 from Freeman's cases in four separate accounts, only

1. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR-1-102 (repealed 1986). The same language is currently found in INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (West 1992).

2. See, e.g., *In re Brault*, 471 N.E.2d 1124 (Ind. 1984); *In re Deloney*, 470 N.E.2d 65 (Ind. 1984); *In re Aungst*, 467 N.E.2d 698 (Ind. 1984); *In re Hayes*, 467 N.E.2d 20 (Ind. 1984); *In re Slenker*, 424 N.E.2d 1005 (Ind. 1981); *In re Costello*, 402 N.E.2d 970 (Ind. 1980); *In re Kesler*, 397 N.E.2d 574 (Ind. 1979); *In re Cochran*, 383 N.E.2d 54 (Ind. 1978); *In re Vincent*, 374 N.E.2d 40 (Ind. 1978).

3. 597 N.E.2d 310 (Ind. 1992).

4. 602 N.E.2d 131 (Ind. 1992).

5. 602 N.E.2d 1022 (Ind. 1992).

6. "It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4(b) (West 1992).

7. *Id.* This language divorces the disciplinary law from any dependence on the pursuit of criminal charges. For example, a lawyer could, conceivably, be acquitted of criminal wrongdoing after a jury trial and still face professional disciplinary action. Some jurisdictions, however, view a criminal acquittal as dispositive of professional misconduct. See generally 2 GEOFFREY HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 8.4:301 (Supp. 1991).

one of which was Frosch's trust account. He did not advise Freeman of the funds he was holding until March 10 and gave no written accounting of these funds to Freeman until late April. Ultimately, Freeman and Frosch agreed to arbitration, and, on October 24, 1989, Frosch was instructed to retain \$12,515 as his fee for the representation and return \$6,985 with interest to Freeman. Frosch complied.

During the pendency of the arbitration, a check from Frosch's trust account in the amount of \$130 was returned because of insufficient funds. This check demonstrated that client funds were used by Frosch without the client's consent.

The Indiana Supreme Court found Frosch had negligently failed to supervise the paralegal to whom he had "delegated the responsibility of depositing funds in the office and personal accounts."⁸ In evaluating the charges, the Indiana Supreme Court found that Frosch failed to give his client prompt notice he had received the funds, failed to provide a prompt accounting to his client, failed to surrender funds to his client promptly upon termination of the representation, and had withdrawn funds about which he and the client had a dispute.⁹ These were found to be violations of Rules 1.15(b) and 1.16(d) of the Indiana Rules of Professional Conduct.¹⁰ The court then rejected the Commission's contention that Frosch had committed a criminal act reflecting adversely on his honesty, trustworthiness, and fitness as a lawyer in violation of Rule 8.4(b).¹¹ The court, in assessing the appropriate sanction, explained its decision this way:

Standing alone, Respondent's failure to account for and surrender funds held on behalf of the client and his withdrawal and use of such funds without the client's permission would warrant a severe sanction. However, we note that the Respondent did notify the client that he was holding the funds approximately one month after the termination of employment and did give an accounting some two months after the termination. The client acknowledged that the Respondent was owed some compensation for services and as reimbursement for court costs, but disputed the amount. These circumstances mitigate what otherwise would constitute a criminal act and extremely serious professional misconduct.¹²

Frosch was then given a sixty-day suspension.

8. *In re Frosch*, 597 N.E.2d 310, 311 (Ind. 1992).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 311-12.

In *Jarrett* the respondent lawyer was charged with six counts of misconduct in dealing with client affairs in civil matters.

Count I concerned a matter in which Lewis hired Jarrett to pursue a wrongful termination and civil rights claim. Lewis paid Jarrett and the case was filed shortly thereafter. Jarrett failed to appear for a disposition hearing, and the case was otherwise neglected. Although the case ended up being dismissed for a lack of prosecution, Jarrett told Lewis he had a meeting scheduled to discuss settlement. Lewis subsequently discovered on his own that his case had been dismissed. Jarrett was found to have violated Rule 1.2(a) of the Indiana Rules of Professional Conduct based on his failure to abide by Lewis' directions regarding the objectives of the representation; Rule 1.3 based on his lack of diligence in pursuing Lewis' claims; Rule 1.4 based on his failure to communicate with Lewis; Rule 1.5 based upon his charging an unreasonable fee; Rule 3.2 for failing to expedite the pending litigation; Rule 3.4(c) based on his failure to obey an obligation imposed by a tribunal; Rule 8.4(c) based on engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and Rule 8.4(d) for conduct prejudicial to the administration of justice.¹³

Count II concerned an instance in which Jarrett was hired to obtain the refund of an earnest money deposit and received a \$455 retainer. After negotiations failed, Jarrett told his client suit had been filed when it had not. He also gave his client a fictitious trial date. The client subsequently traveled from Michigan to Indiana to testify and Jarrett failed to appear. The client sued Jarrett for \$935 and won. Jarrett then failed on his promise to pay, and the client sought and received a bench warrant for Jarrett's arrest. After his arrest, he posted bond, and the bond was forfeited to satisfy the client's judgment. In addition to the more obvious violations involving Jarrett's neglect of an entrusted matter and his failure to communicate with this client, he was found to have violated Rule 1.1, which requires a lawyer to provide competent representation to his clients.¹⁴ Jarrett was also found to have engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.¹⁵

Count III concerned an act in which Jarrett placed \$8,000 into his trust account to pay off certain medical bills for which his client was responsible as part of a domestic relations case. After final judgment in the case, he took \$3,000 in fees and never paid any of the medical bills. The client hired successor counsel, and Jarrett negotiated a reduced fee settlement and then misrepresented that he had sent a settlement

13. *In re Jarrett*, 602 N.E.2d 131, 132-33 (Ind. 1992).

14. *Id.* at 133.

15. *Id.*

check. When Jarrett's check was finally sent, it was returned from the bank due to non-sufficient funds in his account. Jarrett was charged with numerous violations. Of particular note, however, was the violation of Rule 8.4(c) regarding dishonesty, fraud, deceit, or misrepresentation. The Indiana Supreme Court, in reviewing the findings, found it very persuasive that Jarrett had done his level best to hang on to his client's funds as long as he could.¹⁶

Count IV concerned a matter in which Jarrett settled a civil rights case on behalf of a client for \$5,000. He took \$1,000 as his fee and then retained \$4,000 purportedly as his fee for a subsequent criminal representation. No monies were ever returned to the client. In addition to again finding a violation of Rule 8.4(c), the Indiana Supreme Court found Jarrett had committed a criminal act by retaining his client's funds in violation of Rule 8.4(b).¹⁷ The court also cited Jarrett for another competence violation under Rule 1.1.¹⁸

In Count V Jarrett was found to have violated the competent representation standard in Rule 1.1 again and to have violated Rule 8.4(d) by engaging in conduct prejudicial to the administration of justice.¹⁹ In this count, Jarrett undertook representation of a client in a murder case. Although his stated fee was \$5,000, he had only received \$2,000 by the time of trial. After the client was convicted, the client and his family expected Jarrett to file and argue a Motion to Correct Errors and perfect the client's appeal. Jarrett did nothing after the verdict and refused to communicate with his client.

Finally, under Court VI, Jarrett was found to have violated Rules 1.1 on competence; 1.3 regarding diligent representation; and 8.4(c) and (d) regarding his honesty and engaging in conduct prejudicial to justice.²⁰ Under the rather bizarre facts of this count, Jarrett was paid \$275 to obtain a marriage dissolution for his client. After about sixty days, she called to find out what progress had been made with her case. Jarrett directed her to be at the Lake County Government Center on November 15th (approximately four months later) for a hearing which would "officially dissolve" the marriage.²¹ On the date specified, Jarrett met the client and her friend as arranged and told her, "We will wait outside the courtroom for ten minutes and if Mr. Bailey doesn't show then your marriage will be officially dissolved."²²

16. *Id.* at 134.

17. *Id.*

18. *Id.*

19. *Id.* at 135.

20. *Id.*

21. *Id.*

22. *Id.*

In assessing sanction, the Indiana Supreme Court considered six factors: (1) an examination of the nature and course of the lawyer's actions, (2) any consequences flowing from his actions, (3) his state of mind, (4) the court's duty to preserve the integrity of the profession, (5) the risk to the public, and (6) aggravating or mitigating factors.²³ In this case, the Indiana Supreme Court found that Jarrett's prior private reprimand aggravated his present misconduct and suspended him from the practice of law for three years.²⁴

The third case in this triad of client fund misappropriation cases is *In re Cawley*, in which the defendant lawyer was hired to process a relatively complicated estate in 1988. On June 13, 1990, Cawley, as copersonal representative, withdrew \$12,000 from the estate's account through the use of a presigned check. Cawley did not inform the other personal representative of this withdrawal. Instead, she learned of the withdrawal when she examined the estate's bank statement in July. When she questioned the lawyer about it, he readily admitted he had withdrawn the monies for personal use. He also promised to repay the monies with interest, although he did not do so until February 1992.

In its opinion, the Indiana Supreme Court was unanimous in the belief that Cawley's conduct constituted a violation of Rule 8.4(b) of the Indiana Rules of Professional Responsibility in that he had committed a criminal act reflecting adversely on his honesty and trustworthiness.²⁵ The court, however, split three-to-two on the question of the appropriate sanction to impose.²⁶ The majority, in imposing a six-month suspension, relied on six factors in mitigation:

- (1). After the conversion, Cawley remained as attorney for the estate with the permission of the copersonal representative,
- (2). At the time of the conversion, Cawley was experiencing financial difficulties compounded by domestic relations problems,
- (3). Cawley had no prior history of misconduct,
- (4). He readily admitted his wrongdoing,
- (5). He was remorseful, and
- (6). He recognized the seriousness of his misconduct and asked the court for mercy in imposing sanction.²⁷

In imposing sanction, the majority decided that, at the conclusion of the six-month suspension, Cawley's reinstatement to practice should be automatic.²⁸

23. *Id.*

24. *Id.* at 136.

25. *In re Cawley*, 602 N.E.2d 1022, 1023 (Ind. 1992).

26. *Id.* at 1024.

27. *Id.* at 1023.

28. *Id.* at 1024.

The two dissenting Justices would have imposed an eighteen-month or a two-year suspension, respectively.²⁹ Such suspensions in excess of six months require the respondent lawyer to demonstrate his fitness to return to the practice by going through the reinstatement process spelled out in Admission and Discipline Rule 23, Section 4, which includes, among other steps, successful completion of the Multistate Professional Responsibility Examination (MPRE).³⁰

C. Analysis

The cases suggest that the Indiana Supreme Court's approach to financial misconduct by lawyers has been undergoing some reconstruction. Specifically, it appears that the methods used to misappropriate funds have not changed, but the presentation and reliance on mitigating factors is much greater than in cases from just a few years ago.

By way of illustration, six of the pre-1984 cases discussed previously³¹ involved financial misconduct associated with estates. Although the Indiana Supreme Court discussed the various facts in mitigation offered in these cases by the respondent lawyers, they ultimately relied on the perceived danger to the public and the damage done to the integrity of the profession in imposing disbarment.

Another indicator of the increased recognition of facts in mitigation is the rarity with which the lawyer's role as a fiduciary is discussed.³² Three of the pre-1984 cases mentioned earlier³³ expressly discuss the lawyer's heightened responsibilities as a fiduciary and the serious consequences flowing from the abandonment of those responsibilities. Some recognition of this enhanced duty is important in cases where a "criminal act" is found under Rule 8.4(b).³⁴ The lawyer, as a fiduciary, holds funds for others on condition that the funds are not commingled with his own and otherwise remain intact at all times.³⁵ Any other solution must be fiduciary conversion.

29. *Id.*

30. INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS Rule 23, § 4(b)(9) (West 1992).

31. See *In re Aungst*, 467 N.E.2d 698 (Ind. 1984); *In re Brault*, 471 N.E.2d 1124 (Ind. 1984); *In re Slenker*, 424 N.E.2d 1005 (Ind. 1981); *In re Costello*, 402 N.E.2d 970 (Ind. 1980); *In re Kesler*, 397 N.E.2d 574 (Ind. 1979); *In re Cochran*, 383 N.E.2d 54 (Ind. 1978).

32. See RESTATEMENT OF RESTITUTION § 190(a) (1935) (catalogs a variety of fiduciary relationships including the attorney-client relationship).

33. See *In re Aungst*, 467 N.E.2d 698 (Ind. 1984); *In re Brault*, 471 N.E.2d 1124 (Ind. 1984); *In re Kesler*, 397 N.E.2d 574 (Ind. 1979).

34. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4(b) (West 1992).

35. See RESTATEMENT OF RESTITUTION § 209 (1935).

It also seems appropriate that, in situations such as *Frosch*, when a lawyer delegates his financial responsibility to a nonlawyer, objective and demonstrable safeguards should be in place to protect the client's interests. Only in this way would the fiduciary be able to vindicate himself successfully from claims of misconduct and conversion.³⁶ This line of reasoning, apparent in past cases, is not explicitly stated in the most recent decisions.³⁷ As a result of this absence, otherwise unrelated (and, to the client, irrelevant) facts in mitigation receive significantly greater weight than in years past.³⁸

II. THE THREE "R'S": REINSTATEMENT, REMORSE, AND RESTITUTION

A. *The Gutman Decision*

During 1992, the Indiana Supreme Court had occasion to opine on a rarely addressed subject in attorney discipline cases: the reinstatement of suspended or disbarred lawyers. In *In re Gutman*,³⁹ the petitioning

36. In fact, Rule 5.3 requires these safeguards presently:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and,

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

INDIANA RULES OF PROFESSIONAL CONDUCT Rule 5.3 (West 1992). Creation and use of these standards safeguard the lawyer, firm, support staff and clients equally.

37. In *In re Smith*, 572 N.E.2d 1280 (Ind. 1991), the court discussed, at some length, the role of the lawyer as a fiduciary. That discussion, however, dealt with an issue parallel to the one here; namely, that transactions entered into during the existence of a fiduciary relationship are presumptively invalid as the product of undue influence.

38. Only two noteworthy exceptions to this pattern were found. *In re Huebner*, 561 N.E.2d 492 (Ind. 1990) and *In re O'Connor*, 553 N.E.2d 481 (Ind. 1990) were cases involving client fund conversion, and both lawyers were disbarred. Huebner failed to appear for his disciplinary hearing. O'Connor, meanwhile, was found in violation of the Rules of Professional Conduct in seven charged counts *and* while suffering from an alcohol and cocaine addiction problem.

39. 599 N.E.2d 604 (Ind. 1992).

lawyer had resigned from the bar in September 1985 while facing charges in a disciplinary action. The disciplinary charges were based on Gutman's convictions of crimes including the conspiracy to commit extortion. These charges were filed in the United States District Court for the Southern District of Indiana. The convictions were later affirmed in *United States v. Gutman*.⁴⁰ In the underlying case, Gutman, a former President Pro Tem of the Indiana Senate, solicited money from the Indiana Railroad Association on behalf of two other state senators. The Association made the payments from 1973 through 1976 in the form of \$1,000 checks to each senator who would then write checks for \$333 to the other two. In consideration for these payments, Gutman and the others were to render favorable assistance to the Association's interests in the Indiana General Assembly.

In keeping with Admission and Discipline Rule 23, Section 4(a),⁴¹ Gutman waited five years before filing his petition for reinstatement. Under Rule 23 Section 4(b), the lawyer seeking to be reinstated has the burden of showing the following by clear and convincing evidence:

1. He desires in good faith to obtain restoration of his privilege to practice law;
2. He has not practiced law in this state or attempted to do so since he was disciplined;
3. He has fully complied with the terms of the Order for discipline;
4. His attitude towards the misconduct for which he was disciplined was one of genuine remorse;
5. His conduct since the discipline was imposed has been exemplary and above reproach;
6. He has a proper understanding of and attitude towards the standards that are imposed upon members of the Bar and will conduct himself in conformity with such standards; and
7. He can safely be recommended to the legal profession, the courts, and the public as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the Bar and an officer of the Courts.⁴²

40. 725 F.2d 417 (7th Cir. 1984).

41. INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS Rule 23, § 4(a) (West 1992).

42. *Id.* § 4(b). This section has since been amended to include a requirement that petitioners for reinstatement must pass the Multistate Professional Responsibility Examination as a condition precedent to even filing the petition. See INDIANA RULES FOR ADMISSION TO THE BAR Rule 23, § 4(b)(9) (West 1992).

In evaluating Gutman's case, the Indiana Supreme Court conducted an investigation into similar cases from many states⁴³ and found:

Because a petitioner for reinstatement comes before us with a record of impaired professional fitness, he must prove that he has overcome those weaknesses which produced the earlier misconduct, has been rehabilitated, and is now trustworthy. . . . Such petitioner bears a heavier burden than one who must prove fitness at an initial admission to the Bar. A petitioner for reinstatement must undergo a more exacting scrutiny, and a more rigorous showing of professional moral character is required for purposes of reinstatement than for original admission to the Bar.⁴⁴

The Indiana Supreme Court then relied on a balancing test where the seriousness of the misconduct is placed on one side of the scale and the lawyer's subsequent conduct and present character are evaluated on the other. The court declined to make the severity of the original sanction dispositive of the question of subsequent reinstatement. The court did believe, however, that the sanction could serve as a "guidepost" for evaluating the weight assigned the underlying misconduct.⁴⁵ Other jurisdictions, however, foreclose the question of reinstatement in specified cases at the time of imposing initial sanction.⁴⁶

In denying Gutman reinstatement, the Court relied on the Disciplinary Commission Hearing Officer's findings that Gutman had "failed to demonstrate genuine remorse"⁴⁷ in that he failed to apologize or make any concerted effort at restitution. This failure to make restitution was considered by the court to be a "strong indication of lack of rehabilitation."⁴⁸

The Indiana Supreme Court also accepted the Commission's conclusion that Gutman failed to carry his burden on the issue of professional competence. While his attendance at various legal education seminars and independent study was deemed insufficient to show his currency in legal skills, the court suggested that it would have found his successful

43. See *State v. Russo*, 630 P.2d 711 (Kan. 1981); *In re Raimondi*, 403 A.2d 1234 (Md. 1979); *In re Wegner*, 417 N.W.2d 97 (Minn. 1987); *In re Rossellini*, 739 P.2d 658 (Wash. 1987); *In re Brown*, 273 S.E.2d 567 (W. Va. 1980).

44. 599 N.E.2d at 607-08 (citations omitted).

45. *Id.* at 609.

46. See, e.g., *In re Spina*, 580 A.2d 262 (N.J. 1990). This case is typical of the treatment given some attorneys in New Jersey where the offending lawyer is both disbarred and permanently enjoined from ever practicing law in the state again.

47. 599 N.E.2d at 609.

48. *Id.* at 610.

completion of the Multistate Professional Responsibility Examination "extremely persuasive on th[e] issue" had he elected to take it.⁴⁹

B. *The Impact of Gutman*

In itself, Gutman's case is a valuable decision for both the Commission and the limited number of lawyers who need to be concerned about the requisite showing for reinstatement post-discipline. The effect of the opinion, however, has a much broader impact on lawyers in their daily practice than first suspected. On December 9, 1992, the Indiana Supreme Court handed down its opinion in *In re Levinson*.⁵⁰ In that case, the respondent lawyer undertook the representation of a criminal defendant in a postconviction relief matter. The lawyer agreed to charge a total fee of \$1,700 if he pursued the matter, but first he would review the transcripts to determine the merits of pursuing the case. The court found that the lawyer accepted a retainer of \$500, made no attempt to obtain the transcripts and never contacted his clients in response to multiple requests for information. In ruling that Levinson had engaged in misconduct, the court found that his sanction should be aggravated because of a prior disciplinary action on similar grounds.⁵¹ The court imposed a suspension on the lawyer for one year and, as a condition precedent to reinstatement, required him to make restitution to the client. The *Levinson* opinion, following *Gutman* by only three months, suggests that the repayment of client funds is a vital step for the respondent lawyer in a disciplinary case. In a larger sense, then, *Gutman* should serve as a message to the Bar generally that restitution should be seriously considered in resolving any attorney-client dispute informally as long as the payment is not an attempt to limit the lawyer's liability for his action.⁵² This is true even if the Disciplinary Commission is not involved.

C. *Historical Perspective*

The Indiana Supreme Court has wrestled for more than a century with the question of whether restitution is appropriate in lawyer discipline cases. In each case, the tension between two countervailing views has

49. *Id.*

50. 604 N.E.2d 599 (Ind. 1992).

51. *Id.* at 600. See *In re Levinson*, 444 N.E.2d 1175 (Ind. 1983).

52. Rule 1.8(h) creates a discrete violation of law for a lawyer to enter into an agreement with a client which prospectively limits the lawyer's potential liability for malpractice. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (West 1992). The danger of conflict between the interests of the client and the lawyer's self interest is too great to ignore. Presumably, creating one of these agreements would require the lawyer's withdrawal from representing the client under Rule 1.16(a)(1).

been apparent. On one hand, the potential for restricting a lawyer's ability to practice is a powerful weapon for forcing the lawyer to disgorge unearned fees while simultaneously maintaining the integrity of the profession. On the other hand, the client may have actions both at law and in equity to which the lawyer may have valid and persuasive defenses to, at least, part of the claim. This view holds that a disciplinary action is not the appropriate forum for resolving what is an otherwise private dispute between the lawyer and his client.

This latter view prevailed in the 1845 case of *Dawson v. Compton*.⁵³ Under the law at that time, a disciplinary action began as a private cause of action in the appropriate circuit court. In *Dawson*, the plaintiff joined his disciplinary claim with one for the return of monies the lawyer collected for him. The lawyer pleaded a variety of defenses with respect to the funds but lost in the Allen Circuit Court. In reversing the decision, the Indiana Supreme Court held that "the statute confers no power on the Court to pronounce any other judgment against the delinquent attorney than to suspend him from the practice of law. The injured client must seek redress in another form of action."⁵⁴ The court further held that the circuit court was required to hear the lawyer's defenses, as they might mitigate, if not justify, the conduct.⁵⁵

The Indiana Supreme Court was again called upon to examine the propriety of restitution in disciplinary cases in 1869 in *Reilly v. Cavanagh*.⁵⁶ In that case, three clients charged Reilly with misconduct for refusing to turn over funds he had collected on their behalf. Based upon the totality of their allegations, Reilly asked for a jury trial and denied their claims. The Warren Circuit Court found against Reilly and ordered both his suspension from practice and repayment of monies to the plaintiffs. The Indiana Supreme Court reversed and found that the law had changed since *Dawson* and that an attorney could be both suspended and have a money judgment rendered against him in the same case. The reversal in *Reilly* was to allow for a trial by jury on the questions presented.⁵⁷

More than a century later, the Indiana Supreme Court again approached the question of restitution in *In re Case*.⁵⁸ There the lawyer was ordered to make restitution as a condition precedent to reinstatement after a one-year suspension.⁵⁹ In that case, the lawyer had been charged

53. 7 Blackf. 421 (Ind. 1845).

54. *Id.* at 422.

55. *Id.* at 423.

56. 32 Ind. 214 (1869).

57. *Id.* at 218.

58. 311 N.E.2d 797 (Ind. 1974).

59. *Id.*

with undertaking representations in two estate cases and subsequently neglecting both. In a dissenting opinion, Justice Roger O. DeBruler challenged both the length of the suspension and the order of restitution.⁶⁰ He cited five reasons for his dissent, paraphrased as follows:

1. The client has remedies available at the trial court level to which the defendant attorney can assert a full panoply of defenses;
2. The main purpose of disciplinary actions is to regulate the conduct of lawyers in the public interest. Issues of damages and restitution cause the focus of the disciplinary case to move to an area different from its main purpose;
3. The procedural rules for prosecuting a disciplinary case do not authorize damage awards as part of the regulatory process. The Court's order in *Case* was, in Justice DeBruler's opinion, unconstitutionally vague;
4. Awarding damages in a disciplinary proceeding unconstitutionally denies the Respondent attorney of his right to a trial by jury; and
5. There is no logical nexus between the lawyer's ability to make restitution and his ability to re-assume his fiduciary role after the period of suspension.⁶¹

Justice Richard Givan joined in this dissent to the extent that ordinary restitution was inappropriate.⁶²

The next year, however, the Indiana Supreme Court adopted the reasoning used by Justice DeBruler's dissenting opinion in *Case* in declining to order restitution in *In re Ackerman*.⁶³ After quoting the factors cited by Justice DeBruler, the court held, "We have concluded that such views are sound and that restitution cannot properly be ordered in disciplinary matters, although we are also unanimous in our belief that in good conscience restitution ought to be made."⁶⁴

D. The Nexus

Since *Ackerman* was decided in 1975 and before either *Gutman* or *Levinson*, no Indiana case had mentioned restitution as a condition for reinstatement or in any other form of order. Across the country, there

60. *Id.* at 799 (DeBruler, J., dissenting).

61. *Id.* at 799-800.

62. *Id.* at 800.

63. 330 N.E.2d 322 (Ind. 1975).

64. *Id.* at 324.

are three views on this topic.⁶⁵ One group of states has the legal authority to order restitution during the course of disciplinary proceedings and exercises that authority. Other state high courts believe that they have the authority but declines to make such orders. The third view, apparently unique to Indiana, is that there is no authority to order restitution and it should not be a part of the original order for discipline. *Levinson* appears to change that view.

Gutman is the logical choice for explaining the Indiana Supreme Court's now unanimous view that a nexus exists between a lawyer's willingness to make restitution and his fitness to serve in the fiduciary role of attorney. As mentioned previously, Gutman's lack of any effort at restitution provided a "strong indication of lack of rehabilitation."⁶⁶ The message seems clear: Sanctioned lawyers must somehow square accounts with the people they have aggrieved if they expect to be readmitted to the Bar. By issuing orders of this type, the court avoids the due process complaint identified in *Ackerman* while assisting the wronged client through the regulatory process. This approach to disciplinary cases augments the public protection function of lawyer discipline without unduly burdening the process with the resolution of fee dispute issues. Indeed, the Indiana Supreme Court's approach now takes the burden of initiating remedial action away from the client and places it squarely on the sanctioned lawyer. In a broader view, restitution should become one of the avenues regularly investigated by members of the Bar whenever attorney-client disputes arise.

III. COURTROOM DEMEANOR

The Indiana Supreme Court also had occasion in 1992 to express their view on disruptive courtroom behavior in *In re Ortiz*.⁶⁷ In *Ortiz*, the respondent lawyer represented a defendant in a criminal case in the Tippecanoe Superior Court. After the jury convicted the defendant, the case moved on to the habitual offender phase. During this phase, the client's criminal record was presented to the jury. The deputy prosecutor, in rebuttal closing argument, referred to an arrest of the defendant. Although the respondent objected, the trial court overruled the objection, and the deputy prosecutor cited other arrests to the jury. After the jury was sent to lunch, the judge held a conference in chambers in which the respondent lawyer threatened to leave unless he was placed under

65. This trilogy of views is discussed at length in Patricia Jean Lamkin, Annotation, *Power of Court to Order Restitution to Wronged Client in Disciplinary Proceeding Against Attorney*, 75 A.L.R. 3d 307 (1977).

66. *In re Gutman*, 599 N.E.2d 604, 610 (Ind. 1992).

67. 604 N.E.2d 602 (Ind. 1992).

arrest. Ortiz told the judge he would not, "[go] in there in front of the jury and allow the State to railroad [his] client into a conviction by uncharged, unconvicted . . . misconduct."⁶⁸

Thereafter, the respondent lawyer, the deputy prosecutor and the judge engaged in a lengthy colloquy reprinted at length in the court's opinion. Eventually, a physical altercation between the lawyer and a deputy sheriff occurred. Although the lawyer sat with his client when the jury was sent to deliberate, the judge cited the lawyer for direct criminal contempt and sent him to the Tippecanoe County Jail to await their verdict. He returned to the court and sat with his client "under protest" while the verdict was read.⁶⁹ Ortiz apologized to the court, but disciplinary charges were subsequently filed.

The Commission charged the lawyer with conduct intended to disrupt a tribunal in violation of Rule 3.5(c) of the Rules of Professional Conduct.⁷⁰ Not surprisingly, the Indiana Supreme Court was unequivocal in condemning the misconduct in this case:

The findings in this case clearly establish that Respondent intentionally disrupted a proceeding, ostensibly as the result of an unfavorable decision by the trial court. There is no justification for this conduct, regardless of the need for effective representation The record quoted above suggests that the Respondent intentionally endangered his client's interests by his histrionics. His threat to "walk out" in front of the jury was a declaration to the court that he was aware of the potential harm his conduct would create and that he would inflict this harm as a measure of his pique. And amid all of this confusion, hostility and emotion sat a bewildered client who very simply expressed his state of mind as follows: "I don't know what in the hell is going on."⁷¹

Finally, the court noted that Ortiz had been sanctioned for similar conduct in 1990 with a private reprimand.⁷² As a result of this perceived pattern, the Indiana Supreme Court ordered the lawyer suspended for sixty days.⁷³

One of the salient features of this case, however, is the fact that the respondent's misconduct originated in a dispute over a point of law and did not become personally abusive of those present when the outburst

68. *Id.* at 603.

69. *Id.* at 604.

70. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.5(c) (West 1992).

71. *Ortiz*, 604 N.E.2d at 605.

72. *Id.* See *In re Ortiz*, No. 49S00-9004-DI-299 (Ind. Sept. 20, 1990).

73. 604 N.E.2d at 605.

occurred. This is unusual because the more common disciplinary case involving conduct disruptive of a tribunal is rife with personal attacks, profanity, invective, and, occasionally, physical assaults.⁷⁴

In any event, this kind of conduct is always ill-advised and will, eventually, return to haunt the actor. The Comment to Rule 3.5 provides, perhaps, the best guidance for courtroom conduct: "An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence and theatrics."⁷⁵

74. See *In re Crumpacker*, 383 N.E.2d 36 (Ind. 1978) and the cases cited therein for examples of more typical conduct in these cases.

75. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.5 (West 1992).

1992 Developments in Indiana Property Law

WALTER KRIEGER*

I. CONCURRENT OWNERSHIP

A. Joint Bank Accounts

In 1976, Indiana enacted the Non-Probate Transfers Act to govern multiple-party accounts.¹ The Act defines a "joint account" as a contract of deposit established in a financial institution payable on request to any one or more of the parties.² During the lifetime of all the parties the account belongs to the parties in proportion to each party's net contributions to the sums on deposit, absent clear and convincing evidence of a different intent.³ Sums on deposit at the death of a party belong to the surviving parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account was created.⁴ A case of first impression arose during this survey period involving the right of survivorship where one party, prior to his death, removed the name of the other party from a certificate of deposit (CD) without her consent.

In *Voss v. Lynd*,⁵ the husband (Willard) had his wife's (Lennice's) name removed from five certificates of deposit (CDs) totalling \$55,500, after her admission to a health care center with Alzheimer's disease. Willard went to the bank that had issued four of the CDs and orally requested removal of Lennice's name. Following standard procedures, the bank simply marked through Lennice's name. Lennice's name was also crossed out on a CD issued by another bank. Willard died in November 1989.⁶ Lennice died in January 1990.

In May 1991, Lennice's estate filed a complaint asserting ownership of the five CDs by right of survivorship. Willard's estate cross-claimed against the banks, alleging negligent failure to advise him of the proper

* Associate Professor of Law, Indiana University School of Law—Indianapolis. A.B., 1959, Bellarmine College; J.D., 1962, University of Louisville; LL.M., 1969, George Washington University.

1. IND. CODE §§ 32-4-1.5-1 to 15 (Supp. 1992). Fourteen of these 15 sections were taken from UNIF. PROBATE CODE art. VI, § 8 U.L.A. 520 (1983).

2. IND. CODE § 32-4-1.5-1(1), (4) (Supp. 1992).

3. *Id.* § 32-4-1.5-4 (Supp. 1992).

4. *Id.*

5. 583 N.E.2d 1239 (Ind. Ct. App. 1992).

6. *Id.* at 1240-41.

procedure to change the form of the accounts.⁷ The trial court ruled that four of the CDs belonged to Lennice's estate and the attempt to remove her name from the CDs was invalid.⁸ The trial court also concluded the banks were not negligent in failing to advise Willard that Indiana Code section 32-4-1.5-5 required a written order be given to a financial institution to change the form of a joint account, and entered judgments in their favor on Willard's estate's cross-claim. Willard's estate appealed.⁹

The court of appeals first discussed whether the banks were negligent in not advising Willard to comply with Indiana Code section 32-4-1.5-5. The trial court found that the request to remove Lennice's name was not a "transfer" requiring a written order, and that the banks could act on the *oral* instructions of any of the parties named on the certificate.¹⁰ The court of appeals concluded that use of a written order to the banks would not have changed the result of the case, even assuming *arguendo* that a written order was required:

A joint account can be terminated only by mutual agreement of the joint tenants. *Moreover, one joint tenant of money in a joint bank account cannot divest the other of his joint ownership by withdrawing the money without the other's knowledge and consent.* Neither joint tenant can dispose of the interest of the other in life. It follows that the striking of one of the joint tenant's names from the account is ineffectual.

Lennice's estate would still have acquired the CDs by right of survivorship. The banks' failure to inform Willard to make his request in writing did not cause the result of the CDs being given to Lennice's estate.¹¹

Thus, the majority of the court concluded that the right of survivorship cannot be destroyed by one party removing the other party's name from the account or by withdrawing all the funds and closing the account, unless the other party consents to the termination of the joint ownership.¹²

7. *Id.* at 1241. Indiana Code § 32-4-1.5-5 provides that rights of survivorship are to be determined by the form of the account at the death of a party and that the form of the account may be changed by a written order given by a party to the financial institution.

8. *Voss*, 583 N.E.2d at 1241. The trial court found that one CD, originally issued in Willard's name only, belonged to Willard's estate because Willard had deposited all the money. This ruling was not appealed. *Id.*

9. *Id.* at 1241.

10. *Id.*

11. *Id.* at 1242 (emphasis added) (citations omitted).

12. Although the case involves only the removal of the name of a party from the

In a concurring opinion, Judge Sullivan disagreed with the majority's conclusion that a written order pursuant to Indiana Code section 32-4-1.5-5, without Lennice's consent, would have been ineffective to change the form of the account. Judge Sullivan observed that because section 32-4-1.5-5 permits one party to change the form of a joint account by a written order to the financial institution, and the right of survivorship is determined by the form of the account at the death of a party, a valid change in the form of the account is "a divestment of the survivorship interest held by the other joint tenant."¹³

Finally, Judge Sullivan observed that the question of ownership rights in joint accounts "is one deserving of the attention of our Supreme Court" because "I.C. 32-4-1.5-5, passed in 1976, rendered obsolete the 1948 holding in *Clausen v. Warner* (1948) 118 Ind. App. 340, 78 N.E.2d 551, or at least diluted it substantially."¹⁴

Judge Sullivan's statement is correct—enactment of Indiana's Non-Probate Transfer Act substantially altered Indiana law regarding joint accounts. The *Clausen* decision, relied upon heavily in the majority opinion, described the parties to a joint bank account as "joint tenants" who hold "by the half and by the whole," and held that the husband's withdrawal of the funds in the joint account without his wife's knowledge or consent could not divest her of her "joint ownership."¹⁵ The Act takes a very different approach to the ownership interests of the parties in a multiple-party account. Section 32-4-1.5-3(a) provides: "A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent."¹⁶

The Official Comments of the Indiana Probate Study Commission indicate that the statute assumes the owners of such joint accounts intend "no present change of beneficial ownership," and that the theory underlying the joint account sections of the statute is that the holders of such joint accounts, while alive, have individual ownership of "values attributable to their respective deposits and withdrawals," so that the right of survivorship to such an account "really is a right . . . which the survivor receives for the first time at the death" of the other account owner.¹⁷ Thus, the right of survivorship arises only at the death of the other party and is determined by the form of the account at death. No

account, the wording of the opinion suggests the same result would have been reached if one of the parties had removed the funds from the account without the other's consent.

13. *Voss*, 583 N.E.2d at 1242-43 (Sullivan, J., concurring).

14. *Id.* at 1243.

15. *Clausen v. Warner*, 78 N.E.2d 551 *passim* (Ind. Ct. App. 1948).

16. IND. CODE § 32-4-1.5-3(a) (1979).

17. *Id.* (Official Comments follow § 32-4-1.5-3).

joint tenancy is created during the lives of the parties. However, termination of the account by the withdrawal of all the funds by one of the parties without the consent of the other party does not destroy the other party's individual interest in the funds. While parties to a joint account have a right to remove their individual funds, if they withdraw more than their moiety of the funds, the other party can bring an action to recover their individual interest improperly withdrawn.¹⁸

Finally, courts do not agree as to the legal effect of an attempt by one party to terminate a joint account by removing the other party's name or by withdrawing all of the funds.¹⁹ Many decisions suggest that such action ends the "joint ownership" and destroys any right of survivorship.²⁰ Other decisions hold that one party's withdrawal of more than their "interest" in the account is wrongful and as a result a right of survivorship still exists in the funds removed.²¹ However, even in these states, where a party does not remove more than their moiety such action is not wrongful and the right of survivorship ceases as to the funds removed.²²

B. Conveyance of Real Estate to Unmarried Persons "as Husband and Wife"

In Indiana, a conveyance to a husband and wife without limiting words' creates a tenancy by the entirety.²³ However, a conveyance to persons not husband and wife cannot create an estate by the entirety because this form of ownership can exist only between husband and

18. See, e.g., *Kleinburg v. Heller*, 345 N.E.2d 592 (N.Y. 1976); *In re Estate of Kohn*, 168 N.W.2d 812 (Wis. 1969).

19. "The law . . . has been in a state of morass, many of the cases which arise being treated very much on an *ad hoc* basis." *Kleinburg*, 345 N.E.2d at 592. See also *In re Guardianship of Medley*, 573 So. 2d 892, 902 (Fla. Dist. Ct. App. 1990). Part of the problem has been the use of at least four different theories by the courts to sustain such accounts. JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 115-16 (3d ed. 1989).

20. *Wiggins v. Parson*, 446 So. 2d 169 (Fla. Dist. Ct. App. 1984) (The "better rule" is that the withdrawal of all the funds by one of the parties destroys any right of survivorship); see also *McEntire v. Estate of McEntire*, 590 S.W.2d 241 (Ark. 1979); *Bealart v. Mitchell*, 585 S.W.2d 417 (Ky. 1979); *Hoffman v. Vetter*, 192 N.E.2d 249 (Ohio Ct. App. 1962); *In re Estate of Kohn*, 168 N.W.2d 812 (Wis. 1969).

21. *Wallace v. Riley*, 74 P.2d 800 (Cal. Ct. App. 1938); *In re Guardianship of Medley*, 573 So. 2d 892 (Fla. Dist. Ct. App. 1990); *In re Will of Filfiley*, 313 N.Y.S.2d 793, *aff'd*, 353 N.Y.S.2d 400 (1970); *Gatewood v. Griffin*, 549 P.2d 829 (Okla. Ct. App. 1976).

22. *Medley*, 573 So. 2d at 892; *Kleinburg v. Heller*, 345 N.E.2d 592 (N.Y. 1976).

23. *Chandler v. Cheney*, 37 Ind. 391 (1871); *Hadlock v. Gray*, 4 N.E. 167 (Ind. 1886).

wife.²⁴ At common law, a conveyance to two or more persons, not husband and wife, without words limiting the estate was presumed to create a joint tenancy.²⁵ This presumption has been changed by statute in most states, including Indiana, and today a conveyance to two or more persons not husband and wife will create a tenancy in common unless the instrument expressly states that the parties hold title as joint tenants with right of survivorship, or the intent to hold title as joint tenants manifestly appears from the tenor of the instrument.²⁶ An interesting problem arises when an unmarried man and woman take title to real estate by a deed purporting to convey the land to them "as husband and wife." Are these words sufficient to overcome the statutory presumption of tenancy in common, *i.e.*, are these words sufficient to show an intent to create a right of survivorship?

In *Perez v. Gilbert*,²⁷ Emma Perez and James Yocum took title to residential property "as husband and wife" on July 8, 1959.²⁸ While James and Emma had been dating since 1958, and living together since March 1959, at the time of the conveyance Emma was still married to Joseph Perez, Sr. In 1960, Emma and Joseph were divorced, and Emma married James. Emma died in 1990, and three of her children brought this action to determine ownership of the real estate.²⁹ The trial court awarded James title in fee simple absolute. The children appealed.³⁰

The trial court concluded that because James and Emma intended to hold the title as husband and wife, a joint tenancy with right of survivorship was created.³¹ The court of appeals reversed. Section 32-1-

24. *Pittsburg, C., C. & St. L. Ry. Co. v. O'Brien*, 41 N.E. 528 (Ind. 1895); *Eilts v. Moore*, 68 N.E.2d 795 (Ind. Ct. App. 1946).

25. ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 5.3 (1984).

26. *Id.* at 204. Indiana Code § 32-1-2-7 provides:

All conveyances and devises of lands . . . made to two (2) or more persons [other than husband and wife], shall be construed to create estates in common and not in joint tenancy; unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy.

IND. CODE § 32-1-2-7 (Supp. 1992).

27. 586 N.E.2d 921 (Ind. Ct. App. 1992).

28. *Id.* at 923. James' and Emma's names also appeared on a mortgage on the real estate as husband and wife. *Id.*

29. *Id.* James did not have any children by Emma, but James did adopt two of Emma's children, James Petty and Pamela (Petty) Gilbert. The children who brought this action are Joseph Perez, Jr., Susan Williams and James Petty. Pamela (Petty) Gilbert is named as a defendant in the action. *Id.*

30. *Id.* at 923-24.

31. *Id.* at 923. The trial court found that at the time of the conveyance Emma and James held the residence as tenants in common, but since they intended to hold as

2-7 of the Indiana Code requires that the intent to create a joint tenancy be expressly stated in the instrument or manifestly appear from the tenor of the instrument.³² James tried to distinguish several earlier Indiana decisions which held a conveyance to unmarried persons "as husband and wife" created a tenancy in common, on the grounds that the parties in those cases did not subsequently marry.³³ In refusing to find a distinction, the court of appeals observed that the intent of the parties must be determined from the actual language used in the deed, not from their subjective intent.³⁴

James argued that use of the phrase "as husband and wife" was sufficient to show an intent to create a right of survivorship, citing cases from other jurisdictions holding that a conveyance to two persons not legally married "as husband and wife" created a right of survivorship.³⁵ The court observed, however, that in addition to the phrase "as husband and wife" the instruments in those cases included language indicating that the grantees held "by the entireties" or "by the entireties with rights of survivorship" or "by the entireties and not as tenants in common." Such language was deemed sufficient to expressly indicate an intent to create a joint tenancy with right of survivorship. Here the deed contained no additional language from which the court could "glean from the 'four corners' of the instrument" an intent to create a joint tenancy.³⁶ Thus the trial court erred in concluding that James and Emma had held title as joint tenants, and that James now held title in fee simple absolute as the surviving joint tenant. The parties had held title to the property as tenants in common, each taking a one-half interest in the whole, and Emma's interest did not pass to James by right of survivorship at her death.³⁷

II. EASEMENTS AND RESTRICTIVE COVENANTS

A. Implied Easements³⁸

In *Hvidston v. Eastridge*,³⁹ the Hvidstons owned an apartment building, and Louis and Ann Eastridge and Charles Pedigo (collectively "the

husband and wife it became a joint tenancy. *Id.* It is not clear from the opinion what circumstances caused the form of ownership to change after the time of the conveyance from a tenancy in common to a joint tenancy. Possibly it was the subsequent marriage that convinced the trial court of their intent to hold title as husband and wife.

32. IND. CODE § 32-1-2-7 (Supp. 1992).

33. *Perez*, 586 N.E.2d at 925.

34. *Id.* at 924-25.

35. *Id.* at 925.

36. *Id.*

37. *Id.* at 925-26. Other issues in the case unrelated to the type of ownership created by the deed are not discussed.

38. An implied easement can arise in two distinct ways. First, it can arise from

Eastridges'') owned a house and lot west of the Hvidstons' property. The properties were once part of a larger tract. When the tract was severed in 1937, a driveway ran north and south between the Hvidstons' apartment building and the house on the Eastridge property. The boundary line between the lots bisected the driveway. In 1977, the Eastridges' predecessor in interest (Schaler) sued the Hvidstons to quiet title to the driveway. The 1977 decision recognized an easement by necessity to permit access to the garage at the rear of the Eastridges' property, and granted the Hvidstons use of the easement for repair and maintenance of the apartment building. In describing the dimensions of "the existing driveway," the court relied chiefly on a 1974 survey, which did not include a "disputed area" at the southeastern corner of "the existing driveway."⁴⁰

In 1985, the Hvidstons sued for damages and rescission of the easement, and the Eastridges counterclaimed for damages. When the Hvidstons failed to respond to the counterclaim, the trial court granted the Eastridges' motion for a default judgment and dismissed the suit with prejudice. The present suit was filed by the Hvidstons in 1987 for damages and to vacate the easement, claiming that the Eastridges and their tenants had improperly expanded the use of the easement beyond the scope of the 1977 decree. After obtaining a default judgment (apparently because of inadequate service upon the Eastridges), Dean Hvidston installed posts at the entrance to the driveway preventing access to the garage. The Eastridges obtained an emergency order requiring Hvidston to remove the posts. Hvidston complied, but a few months later he erected fence posts and drove stakes in or near the easement.⁴¹

When the default judgment was set aside, the Hvidstons filed an amended complaint and the Eastridges counterclaimed for damages. Following a bench trial the court held that the driveway easement included

a prior use of the property, where, during the unity of title, a permanent and obvious servitude was imposed on one part of the land for the benefit of the other, and at the time of the severance its continued use is reasonably necessary for the enjoyment of the dominant estate. *E.g.*, *John Hancock Mut. Life Ins. Co. v. Patterson*, 2 N.E. 188 (Ind. 1885); *Kruger v. Beecham*, 61 N.E.2d 65 (Ind. Ct. App. 1945). For a discussion of the implied easement based on prior use see CUNNINGHAM ET. AL, *supra* note 25, § 8.4. Second, an implied easement can arise by way of necessity where there has been a severance of the unity of ownership of a tract of land in such a way as to leave one part without access to a public road except over the other portion of the tract conveyed or retained by the grantor. *E.g.*, *Shandy v. Bell*, 189 N.E. 627 (Ind. 1934); *Dudgeon v. Bronson*, 64 N.E. 910 (Ind. 1902). For a discussion of the implied way of necessity see CUNNINGHAM ET. AL, *supra* note 25, § 8.5.

39. 591 N.E.2d 566 (Ind. Ct. App. 1992).

40. *Id.* at 567-68.

41. *Id.* at 568.

the "disputed area" at the southern end of the driveway east of the Eastridges' garage, and modified the 1977 decree to allow the parking of vehicles on the easement. The court also prohibited the Hvidstons from driving stakes or poles along the boundary of the easement or performing any type of maintenance to the driveway. The Hvidstons appealed.⁴²

With regard to whether the easement included the disputed area, Donald Pedigo testified that for as long as he could remember, tenants of the Eastridge property had used the disputed area at the southeastern corner of the driveway to turn their cars around. Photographs submitted by the Hvidstons showed automobiles parked in the supposed unused portion of the driveway. Nevertheless, the court held that the easement did not include the disputed area. As the court observed, an implied easement by necessity arises simultaneously with the conveyance severing the larger tract into separate parcels because of circumstances then existing. The 1977 decree stated that the driveway was the sole means of egress to the garage and parking area at the rear of the Schaler property and that Schaler and his predecessors had acquired a permanent easement of necessity to use "the existing driveway" within the boundaries of the Hvidstons' property. The 1977 decree did not create the easement but "merely affirmed its existence and defined its boundaries" as it existed when the tract was severed in 1937. Events occurring after 1937 were irrelevant in determining the size and extent of the easement by necessity.⁴³

Finally, the court rejected the Eastridges' contention that the tenants will experience difficulty in turning their vehicles around unless the disputed area is included in the easement. The court found that turning could be accomplished without encroaching upon the disputed area, either by increasing the number of turns or enlarging the parking area by extending it to the west into the Eastridges' backyard.⁴⁴

The second issue addressed by the court was whether the trial court should have modified the decree to allow parking for reasonable periods

42. *Id.*

43. *Id.* at 568-69. In another case decided during this survey period involving an implied easement arising by necessity, *Tippmann v. Stoutland Associates*, 594 N.E.2d 515 (Ind. Ct. App. 1992), the court reaffirmed the rule that an implied easement by necessity arises simultaneously with the severing conveyance "because of the circumstances then existing, e.g., inaccessibility," and not from circumstances occurring subsequent to the conveyance. *Id.* at 517 (quoting *Hvidston*, 591 N.E.2d at 566). In *Tippmann* the court, in denying a request for a preliminary injunction, found that an alteration in a structure on the alleged dominant estate subsequent to the severance of the two tracts created the accessibility problem. At the time the property was severed there was no need for an easement. *Tippmann*, 594 N.E.2d at 517.

44. *Hvidston*, 591 N.E.2d at 572.

of time on the easement, provided someone was available to move the vehicle upon the request of the other party. The court found no change of circumstances which would justify amending the 1977 decree to permit parking. On the other hand, the court made it clear that this opinion should not be construed to prohibit the parties from stopping their vehicles in the driveway to unload groceries, pick up or drop off a tenant, or unload materials used to repair the apartment building.⁴⁵

The third issue addressed on appeal was the trial court's prohibition against the Hvidstons installing or maintaining stakes or poles of any kind along the eastern boundary of the easement. While agreeing that the Hvidstons should be allowed to place guard rails or similar structures on their property to prevent harm, the court concluded that it was not error for the trial court to enjoin the Hvidstons from erecting stakes or poles in the easement or along its boundaries that would obstruct, interfere with or impede the use of the easement.⁴⁶

Finally, the Hvidstons objected to the trial court's ruling that only the Eastridges could maintain the easement, and argued that they should have a right to make reasonable repairs, alterations and improvements. In rejecting this contention, the court of appeals noted that the Eastridges and their tenants are the primary users of the easement and that the "improvements" envisioned by Dean Hvidston had to do with improvement of the dominant estate and not with the use of the easement.⁴⁷

The court of appeals affirmed the portion of the trial court's decree prohibiting placement of stakes or poles interfering with the use and enjoyment of the easement and vesting maintenance responsibilities solely in the Eastridges. However, the court reversed the judgment to the extent it held that the disputed area was part of the easement and that the parties could park on the easement.⁴⁸

In *Whitt v. Ferris*,⁴⁹ the court addressed the "necessity" requirement for an implied easement. In 1968, the Kumpfs, who owned approximately eighty acres of land, subdivided most of the land, calling the subdivision

45. *Id.* at 572-73 n.7. The court felt compelled to articulate this distinction in view of the animosity between the parties and the fear that further hostilities or confrontations would take place unless these rights were clarified. *Id.*

46. *Id.* at 573. *See* *Hunter v. McDonald*, 254 N.W.2d 282, 286 (Wis. 1977) (holding that the owner of the servient estate could not place rocks and posts alongside a ten foot wide easement to prevent vehicles from occasionally straying beyond the narrow boundaries).

47. *Hvidston*, 591 N.E.2d at 573-74. Evidence at the trial revealed Dean Hvidston had threatened to "bulldoze" the easement and had once ordered his apartment manager to dig trenches in the direction of the Eastridges' property to carry water away from his building. This may explain the court's reluctance to allow Hvidston to "repair" or "improve" the easement. *Id.* at 574.

48. *Id.*

49. 596 N.E.2d 230 (Ind. Ct. App. 1992).

Beechwood County Estates (Beechwood). One of the platted roads, "Tulip Drive," was planned as a street 60 feet wide and 1050 feet long, but only a strip 20 feet wide was graded, with 20 foot strips of grass on each side. For tax reasons, the Kumpfs vacated all the platted lots and streets except lots 1 through 6, which abut a public road, "Kings Road." Kings Road runs north and south and lots 5 and 6 abut the intersection of King Road and the former Tulip Drive on the northwest and southwest corners, respectively. Lot 7 abuts lot 6 to the west and lot 8 abuts lot 5 to the west and both lots 7 and 8 abut Tulip Drive, but neither lot is part of Beechwood Subdivision as currently platted. Ferris owns Lots 5 and 8, Jones owns Lot 6 and Stettler owns Lot 7. The disputed parcel is the 20 foot wide dirt and gravel road and the 20 foot wide strips of grass on each side now owned by Whitt. In 1982, Stettler began using the road on the disputed area as his only means of ingress and egress to Lot 7. Jones also uses the road for access to the back of Lot 6, and Ferris, Jones and Stettler have all used the grassy area for parking. Whitt constructed a fence along the disputed area and the appellees brought suit to prevent Whitt from interfering with their use of the disputed area. The trial court granted each of the appellees an implied easement 60 feet wide and 380 feet long to be used in the same manner as a public road, and Whitt appealed.⁵⁰

With regard to the way of necessity the court of appeals observed that a way of necessity arises where the severance of the unity of ownership of land occurs in such a way as to leave one part of the land without access to a public road. Lot 7 was at one time a part of a larger tract of land which included the disputed area, and the disputed area has been used for ingress and egress since the severance. However, the court found that the trial court erred in granting a sixty-foot-wide easement because easements should be limited to the purpose for which they are created. The court limited the easement to the twenty foot roadway and sufficient footage over the grassy area to allow access to Stettler's driveway.⁵¹ Whitt argued that a way of necessity does not exist where the terms of the conveyance show the parties did not intend the grantee to have an easement over the grantor's property. The court appears to have conceded that parties can explicitly exclude a way of necessity from the conveyance, but found the language in the Brown and Stettler deeds stating that "access to this parcel is not included in the above description," was ambiguous and extrinsic evidence indicated that the words were "merely cautionary" and did not prevent the court from finding a way of necessity in favor of Lot 7.⁵²

50. *Id.* at 232-33.

51. *Id.* at 233-34.

52. *Id.* The drafter of the deed to William Brown testified that the language was

The court next addressed the issue of whether an easement was created by reference to the plat map and observed that the portion of the plat which included the disputed area had been vacated before any of the lots were sold. Under the then-existing statute the vacation destroyed the force and effect of any part of the plat declared to be vacated. Thus, at the time the lots were sold the Kumpfs held fee simple title to the disputed area free of any easements.⁵³ Any reference to the old subdivision in the deeds was for the purpose of showing the location of the lots and not to reinstate the vacated plat or recreate easements to roads in the nonexistent part of the old subdivision.⁵⁴

Finally, the court addressed the issue of whether an implied easement existed based on a use of the land at the time of the severance. The court observed that:

[A]n easement will be implied where (1) there was common ownership at the time the estate was severed, (2) the common owner's use of part of his land to benefit another part (a quasi-easement) was apparent and continuous, (3) the land was transferred, and (4) at severance it was necessary to continue the preexisting use of the benefit of the dominant estate.⁵⁵

While the "necessity" is not the strict necessity required to create a way of necessity, the court noted that some necessity is still required and that one seeking an access easement in Indiana "when only a portion of the land is inaccessible, faces a heavy burden."⁵⁶ Here lots 5 and 6 abut a public highway and there is no need to use the easement. When lots 5 and 8 were transferred to Ferris, access to lot 8 was reasonably accomplished from Lot 5. The garage and driveway on lot 8 were built after the severance from the disputed area.⁵⁷ Thus, the trial court was reversed in part and affirmed as to the way of necessity across lot 7.⁵⁸

B. Restrictive Covenants—Unenforceability Caused by Changed Character of Surrounding Area and Acquiescence

In *Hrisomalos v. Smith*,⁵⁹ the Smiths were interested in purchasing lots 7 and 8 located on the southern edge of Hillsdale First Addition

used to inform the purchaser that there was no public access included within the description. *Id.*

53. *Id.* (citing IND. CODE ANN. § 48-901 (Burns 1963) (current version at IND. CODE § 36-7-3-10 (Supp. 1992))).

54. *Whitt*, 596 N.E.2d at 234-35.

55. *Id.* at 235.

56. For a discussion of the "necessity" required to create an implied easement based on prior use see Walter W. Krieger, *Recent Developments in Property Law*, 25 IND. L. REV. 1375, 1380-83 (1992).

57. *Whitt*, 596 N.E.2d at 236.

58. *Id.*

59. 600 N.E.2d 1363 (Ind. Ct. App. 1992).

(Hillsdale) to operate a dentist's office on the property. The Smiths brought this action for declaratory judgment asking that a covenant limiting the use of structures in Hillsdale to single family dwellings be declared invalid as to lots 7 and 8. The owner of lots 7 and 8 later joined in the petition the Petitioners referred to collectively by the court as the "Smiths"). Several neighbors (Intervenors) opposed the Smiths' petition. The trial court found the covenant unenforceable with regard to lots 7 and 8 and the Intervenors appealed.⁶⁰

The trial court found the covenant unenforceable on two grounds: first, the restrictive covenant was invalid because of radical changes within and surrounding the subdivision; and second, the Intervenors were barred from enforcing the covenant under the doctrine of acquiescence. Both issues were addressed on appeal.

With regard to the change in the character of the area surrounding Hillsdale, the court of appeals agreed with the trial court that there had been extensive commercialization of the area and a substantial increase in traffic on a street bordering Hillsdale. However, the court of appeals did not concur in the trial court's conclusion that there had been a dramatic and compelling change within Hillsdale itself of such a weight as to preclude enforcement of the covenant. Despite considerable commercialization outside Hillsdale, only two activities within Hillsdale itself were not in conformity with the covenant. In 1953, a church bought and began operating on property within Hillsdale with the unanimous consent of those then owning lots in Hillsdale. The court questioned whether this use violated the covenant because the church was built pursuant to an agreed modification of the covenant between it and the landowners. The second nonconformity was the operation of a chiropractic office by Dr. Norman Houze on his property on the southern edge of Hillsdale. No lot owner opposed Dr. Houze's use of his land.⁶¹

The court observed that changes in the character of a neighborhood will not invalidate a restrictive covenant unless the "original purpose of the covenant has been defeated."⁶² In determining whether such radical changes have occurred, little weight should be given to changes outside the subdivision. The focus should be upon the effect of the changes on the purpose of the covenant.⁶³ The trial court's own findings refuted

60. *Id.* at 1365.

61. *Id.* at 1365-67.

62. *Id.*

63. *Id.* In support of this position the court cited *Cunningham v. Hiles*, 395 N.E.2d 851 (Ind. Ct. App. 1979), *order modified on reh'g*, 402 N.E.2d 17. In *Cunningham* the court held that a residential covenant prohibiting commercial activities within the subdivision was still enforceable despite commercialization outside the subdivision which had caused a dramatic increase in the traffic on the border of the neighborhood. The only change

the claim that the change was so radical in nature as to defeat the purpose of the covenant:

Although there has been considerable commercialization outside the addition, residents within the Addition have steadfastly maintained their residential way of life. Within the addition neighbors still gather, and children still play, all in keeping with the residential mandate imposed by the covenant.⁶⁴

The court next addressed the acquiescence theory relied upon by the trial court in finding the covenant unenforceable as to lots 7 and 8. The trial court determined that the Intervenor, by allowing the chiropractic office to operate without protest or action since 1985, had acquiesced in the violation of the restrictive covenant. Those seeking to enforce a restrictive covenant "must do so immediately and consistently." The trial court did not find the consent to the operation of the church to be a waiver or acquiescence of the covenant: "[B]ecause the church was built pursuant to an agreed modification of the restrictive covenant between it and the landholders, it was to be considered a change outside the area covered by the restrictive covenant."⁶⁵ The court of appeals agreed with the trial court that the church property was not a factor in this case. It was dissimilar to, and a less substantial violation than, the operation of a professional office.⁶⁶

Thus, the question of acquiescence turned upon the Intervenor's failure to object to Dr. Houze's office. The court found three factors significant to the analysis:

1) the location of the objecting landowners relative to both the property upon which the nonconforming use is sought to be enjoined and the property upon which a nonconforming use has been allowed, 2) the similarity of the prior nonconforming use to the nonconforming use sought to be enjoined, and 3) the frequency of prior nonconforming uses.⁶⁷

The court observed that while Dr. Houze's office and the use proposed by the Smiths were virtually indistinguishable, Dr. Houze's

within the subdivision itself was an office building that protruded into one corner of the subdivision causing an increased amount of traffic within that corner. *Id.*

64. *Hrisomalos*, 600 N.E.2d at 1365.

65. *Id.* at 1367 n.2.

66. *Id.* at 1368. The court cited *Cowling v. Colligan*, 312 S.W.2d 943 (Tex. 1958), holding that the operation of a church in violation of a restrictive covenant limiting the use of the land to residential purposes was so trivial that failure to complain was not a waiver of the right to enforce the covenant against subsequent business or commercial development. *Hrisomalos*, 600 N.E.2d at 1369.

67. *Id.* at 1368.

office was not in the same block as the lots in issue or any of the property owned by the Intervenor, whereas there was a close proximity between the lots in issue and the land of the Intervenor. In addition, this subdivision did not have a long history of multiple and long-standing noncompliance with the covenant. Instead, there was but a single similar act of nonconformity in a different area. The failure of the Intervenor to object to the more distant nonconforming use did not induce reasonable reliance on the part of others that the covenant would not be enforced, nor was there a lack of benefit in the enforcement of the more proximate nonconforming use. The court of appeals reversed the trial court with direction that judgment be entered for the Intervenor.⁶⁸

III. LAND CONTRACTS

A. *Contractual Rights and Duties*

The installment land contract is an alternative to the more traditional method of conveying real estate.⁶⁹ Under the traditional method, the contract for sale anticipates a transfer of legal title within a few months (time for the buyer to obtain financing and the seller to produce evidence of good title). Normally, the buyer makes a downpayment when the contract is signed and agrees to pay the balance of the purchase price at the closing. In most cases the buyer needs to obtain a loan to pay the balance at the closing. The buyer will sign a promissory note and execute a purchase money mortgage on the real estate. At the closing, the seller will convey title to the real estate by deed and the buyer will pay the seller the balance. The deed and the purchase money mortgage are then recorded and the buyer becomes the legal owner of the land subject to the lender's security interest.

Under the installment land contract, legal title remains in the seller until all contract payments are made (often fifteen or twenty years). If the land contract is silent, the seller is not required to produce marketable title until the installment contract is completed. Thus, the prudent buyer should insist that the seller produce evidence of the status of the title before signing the land contract. The purchaser should also insist upon a provision in the contract providing that any liens on the property maintained by the seller shall not exceed the unpaid installments under the contract.

68. *Id.* at 1369.

69. For a more complete discussion of the installment land contract see Grant S. Nelson & Dale A. Whitman, *Installment Land Contracts—The National Scene Revisited*, 1985 B.Y.U. L. REV. 1.

The status of the seller's title at the signing of the land contract, the seller's right to place or maintain a mortgage on the real estate, and the duty of the real estate agent at the signing of the land contract were all raised in *McAdams v. Dorothy Edwards Realtors, Inc.*⁷⁰ The Parnells, the sellers under a land contract, had borrowed \$31,000 (apparently a purchase money mortgage) from First Federal Saving and Loan Association of Kokomo secured by a note and a mortgage containing a due-on-sale clause.⁷¹ In November 1980, the Parnells entered into an exclusive listing agreement with Dorothy Edwards Realtors, Inc. to sell the property. Gary Taylor, the principal owner of Edwards Realtors, was the Parnells' real estate agent. Through Taylor, the Parnells and the McAdamses entered into a purchase agreement on June 12, 1981, which provided for a sale of the property on an installment land contract for \$72,500. The McAdamses were to pay \$40,000 down and the balance of \$32,500 in monthly installments of \$500. The purchase agreement provided that "title shall be subject to easements, and restrictions of record, if any, and free and clear of all other liens and encumbrances except as herein stated." First Federal's mortgage was not listed.

Before the signing on June 24, 1981, First Federal orally agreed to the sale and did not declare the unpaid balance due and owing. Taylor delivered an abstract of title to the McAdamses' attorney, who issued a title opinion. The opinion concluded that the Parnells had marketable title and indicated that the two existing liens would be satisfied and released at the closing.⁷² The McAdamses' attorney and real estate agent

70. 591 N.E.2d 612 (Ind. Ct. App. 1992). After the survey period had ended, the Indiana Supreme Court granted transfer, set aside the court of appeals opinion, and affirmed the trial court judgment in favor of Dorothy Edwards Realtors. *McAdams v. Dorothy Edwards Realtors*, 604 N.E.2d 607 (Ind. 1992). The court opined that "this case turns on the question of the duty owed to a buyer by the seller's broker," and concluded that no authority could be found "for the proposition that the seller's agent owes a buyer a duty to act in the buyer's best interest." *Id.* at 611. Thus, an agent who negligently fails to perform duties owed the principal is not liable for harm caused to a third person. *Id.* at 612. This simplistic approach to the duty of the real estate broker at the closing appears to overlook the custom (common practice) in Howard County where real estate brokers rather than attorneys attend and apparently preside over closings, and where attorneys give title opinions directly to the broker rather than to their clients. *Id.* at 609. The fact that the broker placed the downpayment into the "Edwards Realtors trust account," *Id.* at 609, further indicates that the broker had assumed duties beyond those of the seller's agent. Attorneys, lenders and others dealing with real estate brokers in matters involving real estate closings should reconsider current practices in light of this decision, which will be discussed fully in next year's Survey issue.

71. If the Parnells sold the property without the bank's consent First Federal could declare the note immediately due and payable. *Id.* at 614.

72. The court is using the term "closing" to indicate the formal signing of the

were not present at the closing. However, Taylor was present at the closing and was aware that the mortgage should have been released. Taylor placed the \$40,079.68 down payment into the Edwards Realtors' trust account and used \$6000 to satisfy another lien on the real estate.⁷³ One day after the closing, the Parnells paid \$10,000 on their debt to First Federal and the terms of the remaining \$20,000 loan were modified. The interest rate was increased and the Parnells agreed to make payments of \$400 a month beginning July 1981. However, no payments were made under this agreement until April 1983 and First Federal never notified the McAdamses that the Parnells were in default on the loan. The McAdamses discovered in February 1984 that the balance of the mortgage exceeded the balance due on the land contract.⁷⁴ First Federal declared the Parnells in default in July 1984, and the McAdamses filed suit against the Parnells, Edwards Realtors and First Federal in October 1984.⁷⁵

The trial court awarded First Federal the balance on the land contract which the McAdamses had deposited with the court (\$6,248.69) and ordered that this amount would discharge First Federal's lien, in effect finding the mortgage subordinate to the McAdamses' interest. Further, the trial court entered judgment for the McAdamses against Edwards Realtors and First Federal in the amount of \$7500 for attorney fees and costs. However, while the trial court concluded that Taylor had acted improperly as the Parnells' agent, and as the real estate broker closing the transaction, the trial court did not award a judgment against Edwards Realtors for the misapplication of trust funds. Both Edwards Realtors and First Federal appealed.⁷⁶

On the first appeal the award of attorney fees was reversed and the court of appeals held that the trial court had erred in refusing to allow First Federal to foreclose on the mortgage. The case was remanded with instructions to direct an order of foreclosure in favor of First Federal. Following the first appeal, the McAdamses entered into an agreement with First Federal. In exchange for the McAdamses' payment of \$46,565.32 and their agreement not to seek a transfer to the Indiana Supreme Court, First Federal agreed not to execute upon an order of foreclosure entered by the trial court.⁷⁷

land contract, the delivery of the downpayment and the releases of the liens, and not the legal closing on "law day" when the deed is to be delivered and legal title transferred to the purchaser upon completion of the land contract.

73. The facts indicate that part of the money in the trust account was used to pay the Parnells' unsecured obligations to Edwards Realtors and others, and that the remaining funds were paid to the Parnells. *Id.* at 615, 618.

74. Each month that the Parnells did not make a payment, First Federal capitalized the interest and added it to the outstanding balance. *Id.* at 615.

75. *Id.* at 614-15.

76. *Id.* at 615-16.

77. *Id.* at 616.

On remand, the McAdamses moved the trial court to enter judgment against Edwards Realtors in the sum of \$40,316.63 (\$46,565.32 mortgage lien less \$6,248.69 deposited with the court). The trial court, however, entered judgment for Edwards Realtors and against the McAdamses.⁷⁸

On appeal by the McAdamses several issues were raised. First, the McAdamses argued that the trial court had committed reversible error by not entering judgment of foreclosure on First Federal's mortgage. Apparently, they were concerned that an order of foreclosure might be viewed as a prerequisite to establishing damages against Edwards Realtors. However, the remark by the court of appeals that the McAdamses were not prejudiced by the failure of the trial court to enter the order foreclosing the mortgage, and the remand to the trial court to determine the damages arising from the agent's misapplication of trust money, indicate that the court viewed the agreement with First Federal as triggering the right of the McAdamses to assert their claim against Edwards Realtors.⁷⁹ Furthermore, the opinion clearly contemplates that upon remand the trial court will find Edwards Realtors liable to the McAdamses for the \$46,565.32 paid to First Federal together with interest thereon.⁸⁰

Edwards Realtors contended that the McAdamses had waived their claim to damages by failing to challenge in the first appeal the trial court's denial of a judgment against Edwards Realtors sufficient to satisfy the mortgage. In rejecting this contention, the court observed that the trial court had found Taylor in breach of his duty to disburse trust account monies in a manner that would comply with the Parnells' obligations under the purchase agreement. However, when the first judgment held First Federal's mortgage was satisfied by payment of the contract balance owed by the McAdamses, there was no need to enter judgment against Edwards Realtors for misapplication of trust funds. But, when the judgment was reversed and foreclosure of the mortgage ordered, it then became necessary to determine the amount of Edwards Realtors' liability.⁸¹

Next, the court addressed Edwards Realtors' contention that in this second appeal it could still challenge the trial court's determination that its agent had a duty to apply the trust funds to satisfy the First Federal mortgage and that it misapplied the funds by paying them to the Parnells. The court found it had not yet "determine[d] whether the finding of a misapplication of trust funds was supported by the evidence," and that Edwards Realtors was not barred by the law of the case from challenging the finding as supported by insufficient evidence.⁸²

78. *Id.* at 617.

79. *Id.* at 617-18, 622-23 (Sullivan, J., concurring).

80. *Id.* at 623 (Sullivan, J., concurring).

81. *Id.* at 618-19.

82. *Id.* at 620-21. However, as Judge Sullivan points out, the court then proceeds

The court then addressed the issue of “[w]hether the trial court’s original determination that Edwards Realtors’ agent misapplied trust and the realty company should account for that misapplication, was supported by sufficient evidence.”⁸³ The trial court originally found the Parnells had a duty to convey title free of First Federal’s mortgage because both the Exclusive Right to Sell Agreement and the Purchase Agreement required the Parnells to furnish an abstract prior to closing showing merchantable title in the Parnells free and clear of all mortgage liens. Further, the trial court determined that the Parnells’ duty was transferable to Edwards Realtors and that, as the Parnells’ agent and the real estate agent closing the transaction, Taylor had the duty to disburse monies from the trust account in a manner that would accomplish the performance of the Parnells’ obligations under the Purchase Agreement.⁸⁴

Edward Realtors argued that this conclusion was in error because the Purchase Agreement incorporated by reference Paragraph 13 of the land contract which provided that: “The seller may, at his election, place or maintain a mortgage on said premises for an amount not in excess of the then unpaid balance of the sale price.” The McAdamses pointed out, however, that Paragraph 13 provided substantial protection to the buyer. Should the seller “hereafter elect to place such a mortgage on the premises he shall before the execution thereof” give written notice to the buyer containing the name of the mortgagee, the principal amount and the rate of interest and the buyer at his election may reduce the unpaid balance under the contract to the unpaid balance of the mortgage and demand a warranty deed requiring the buyer to assume the mortgage. These protections could be circumvented if Paragraph 13 were interpreted to allow the sale of the property with pre-existing mortgages. The McAdamses also contended that the order in which the words “place or maintain” appear in Paragraph 13 is significant. Use of the word “place” before “maintain” indicated that the title had to be free from mortgage liens at the time of the execution of the contract. The majority of the court agreed with the McAdamses’ interpretation of Paragraph 13 and concluded that the reference to the seller’s right to place or maintain a mortgage on the premises can have reference only to mortgages placed or maintained on the premises subsequent to the closing.⁸⁵

to make this determination in issue four, thus making the holding in issue three moot. *Id.* at 623 (Sullivan, J., concurring).

83. *Id.* at 621.

84. *Id.*

85. *Id.* at 621-22. Judge Sullivan did not agree with the majority’s interpretation of paragraph 13. In his opinion, the words “place or maintain” were clear and unambiguous and did not indicate that the seller was limited to “maintaining” mortgages created only after the execution of the land contract. Nevertheless, Judge Sullivan observed that the

The court ordered the judgment vacated and that upon remand the trial court should hold a hearing to determine the amount Edwards Realtors owes the McAdamses for its agent's misapplication of the trust funds.⁸⁶

B. Spouse of Purchaser Acquiring Vendor's Interest at Tax Sale

If the land contract is silent, the purchaser has the duty to pay taxes on the real estate.⁸⁷ However, the seller still must make certain that the purchaser is paying the taxes, or the land might be sold at a tax sale for nonpayment of taxes. A rather unusual situation arose in *Kettery v. Heck*,⁸⁸ where the buyer failed to pay the taxes and the buyer's wife subsequently acquired title to the property from the purchaser at a tax sale. The question became whether the buyer and his wife should be allowed to take the property free and clear of the land contract.

In *Kettery*, Terry and Karen Kettery and Julie Heck agreed in 1981 to exchange real estate. Heck received the Ketterys' residence in Indianapolis and the Ketterys received Heck's residence and one acre of land in Shelby County. The Ketterys also agreed to purchase another 4.13 acres of Shelby County land from Heck by land contract. In 1982, the Ketterys were divorced and Terry purchased Karen's interest under the land contract. Terry was unable to make the balloon payment due in 1985, and Heck and Terry negotiated a new land contract. The new contract provided that Terry would pay all real estate taxes. Terry failed to do so, and the notice of tax delinquency and tax sale was sent to Heck at her old address. The land was purchased by the Kochers at a tax sale in 1985. In 1986, Terry married Lisa Kettery and in October 1987, Lisa purchased the 4.13 acres from the Kochers. In November 1987, the Ketterys' attorney notified Heck of the tax sale and that the Ketterys no longer considered themselves bound by the contract because Heck no longer held title to the land. The letter also demanded restitution of the payments made under the contract since Heck could no longer perform her obligations. Heck responded by filing a two count complaint.

parties intended that an existing mortgage could be maintained only so long as it did not exceed the amount due under the contract and that on remand the trial court might well find that the growth of the mortgage was at least in part due to the failure of Edwards Realtors to properly apply the trust moneys. In addition, there was evidence from which the trial court could have found an obligation to apply the trust fund money to satisfy the mortgage "premised upon the title opinion which directed that the mortgage lien 'should be satisfied and released of record upon payment at closing.'" *Id.* at 623-24 (Sullivan, J., concurring).

86. *Id.* at 622-23.

87. *E.g.*, *Stark v. Kreyling*, 188 N.E. 680 (Ind. 1934).

88. 587 N.E.2d 1365 (Ind. Ct. App. 1992).

Count I alleged breach of the land contract and sought to foreclose a mortgage on the one acre tract. Count II alleged a conspiracy to defraud on the part of Terry and Lisa by intentionally concealing from her the fact that the real estate taxes had not been paid and by deeding the property to Lisa, making it impossible for Heck to perform under the contract. The trial court found in favor of Heck for \$22,304.92 reduced by the amount Lisa had paid to the Kochers. The Ketterys appealed.⁸⁹

Terry alleged the trial court was in error when it concluded that his failure to pay the taxes was the proximate cause of the real estate being sold at the tax sale. Instead he argued that under the contract Heck had a duty to "forward or cause to be forwarded to Purchaser a copy of all statements for real estate taxes on the Real Estate payable by Purchaser, as received." Terry contended that he was to pay the real estate taxes only "as received" from Heck. The court, however, refused to impose upon Heck a duty to obtain the tax statements, and concluded that the words "as received" referred to the statements actually received by Heck. Since she had received no tax statements, she had breached no contractual duty. Further, the court found Terry had breached his contractual duty to pay "the real estate taxes due and payable on November, 1981, and all installments of taxes payable thereafter."⁹⁰

With regard to Count II, the Ketterys claimed there was no evidence of any fraud or conspiracy to support a legal or equitable theory for relief. The court disagreed. Terry and Lisa made no attempt to notify Heck of the tax sale or the tax deed to the Kochers until after Lisa had obtained the Kochers' interest. The court cited by analogy a number of cases holding that a mortgagor in possession or those occupying a position of trust and confidence can not acquire title through a tax deed, particularly where the party is under a duty to pay the taxes.⁹¹

The court concluded that since Lisa was able to purchase the property because Terry had failed to pay the taxes in breach of his contractual duty, it would be unconscionable to allow Lisa to keep the property. The trial court's decision was affirmed.⁹²

IV. LANDLORD AND TENANT⁹³

A. *Scope of Covenant to Repair*

In *Quebe v. Davis*,⁹⁴ the Quebes leased a commercial building to Paul Parks in July 1986. The parties were aware that the roof leaked,

89. *Id.* at 1366-67.

90. *Id.* at 1367-68.

91. *Id.* at 1368-69.

92. *Id.* at 1369-70.

93. During this survey period three decisions were issued involving the landlord's

and the lease required Parks to repair the roof to the satisfaction of the Quebes by August 1, 1986. Parks assigned the lease to Lloyd and Thomas in March 1987, and they assigned the lease to Davis in November 1988. Davis was aware of the leaking roof at the time of the assignment and attempted to make repairs. However, the attempts to repair proved unsuccessful and Davis was advised that the roof needed to be "replaced." The leaky roof damaged Davis' property, and he was forced to vacate part of the building. Davis filed suit against the Quebes for damages caused by their failure to replace the leaking roof. The Quebes counterclaimed for damages for breach of the lease, claiming the lease obligated Davis to maintain the roof. The trial judge found for Davis and awarded \$12,170 damages and \$1000 in attorney fees. The Quebes appealed.⁹⁵

The trial court ruled that it must assume the provision requiring the original tenant to repair the roof to the satisfaction of the Quebes had been complied with on August 1, 1986. In addition, the trial court concluded that "repair and maintenance is different from construction or replacement especially in the case of major structural items and [the Quebes] are responsible for the roof replacement."⁹⁶ The Quebes argued that the trial court erred in describing the work to be done on the roof as a "replacement" chargeable to the lessor rather than a "repair" chargeable to the lessee, noting that the term "replacement" was never used in the lease and that "repair" can include "restoration to a sound or good state after decay, dilapidation, injury, loss, waste, etc."⁹⁷ Thus, they contended that the problem with the roof was covered by the

tort liability for injuries resulting from defective conditions on the leased premises: *Pitcock v. Worldwide Recycling, Inc.*, 582 N.E.2d 412 (Ind. Ct. App. 1991) (business invitee of tenant injured on raised portion of floor); *Houin v. Burger*, 590 N.E.2d 593 (Ind. Ct. App. 1992) (infant fell through a window in a second-floor apartment); *Rogers v. Grunden*, 589 N.E.2d 248 (Ind. Ct. App. 1992) (lessee's employee injured when he came in contact with uninsulated electric line on landlord's property). All three decisions continued to follow the common law rule that the landlord is immune from tort liability for injuries caused by defective conditions on the leased premises where the landlord has surrendered complete control and possession of the premises to the tenant. *See generally* Olin L. Browder, *The Taming of a Duty—Tort Liability of Landlords*, 81 MICH. L. REV. 99 (1982). For a discussion of the landlord's tort immunity in Indiana see Walter W. Krieger, *Recent Developments in Property Law*, 24 IND. L. REV. 1065, 1085-90 (1991).

94. 586 N.E.2d 914 (Ind. Ct. App. 1992).

95. *Id.* at 916.

96. *Id.* at 917 (quoting from trial court record).

97. *Id.* at 916, 919. Although the Quebes made much to do about the meaning of the term "repair" in part 4 of the lease, the court observed that the term is also used in part 5 of the lease in defining the lessor's duty to "repair and restore" premises "damaged or destroyed by fire or other cause." Thus the Quebes' argument on "the scope of 'repair' turns back on them." *Id.* at 919.

“repair” language in part 4 of the lease that: “Tenant shall make all repairs necessary to maintain the Leased Premises in the same condition as they are now. . . . Tenant shall not be obligated . . . to repair any injury to the Leased Premises resulting from fire or other casualty.”⁹⁸

Davis argued that the problem was covered by part 5 of the lease:

If the Leased Premises should be damaged or destroyed by fire or other cause . . . [and] the cost of repairs and restoration is less than thirty (30%) percent [of the building’s replacement cost], then this Lease shall not terminate and the Landlord shall at its expense promptly repair and restore the Leased Premises to substantially the same condition they were in prior to the damage or destruction.⁹⁹

In ruling against the Quebecs, the court determined that the total replacement of the roof made necessary by its deterioration over time was not a “repair” under part 4 of the lease. The court also rejected the Quebecs’ argument that destruction under part 5 of the lease applied only to damages caused by a single occurrence. Instead the court found that a roof can be damaged or destroyed by exposure “to the blistering sun of some twenty or thirty Augusts, the ice and snow of as many Januarys, and the rainfalls of April upon April.”¹⁰⁰ Thus, it was not error for the trial court to conclude that the Quebecs had breached the lease.

The court also addressed the question of whether the trial court erred in ruling that the provision requiring Park to repair the roof must be presumed to have had been complied with on August 1, 1986.¹⁰¹ In upholding the trial court’s ruling, the court of appeals observed that, in the absence of a specific agreement to the contrary, an assignee is not liable for breaches occurring prior to the assignment or for obligations due under the lease before the assignment. The court found that Davis’ promise in the assignment agreement to make all payments and perform all covenants and conditions in the lease was not a specific undertaking to assume an obligation which the original lessee was required to perform more than two years before the assignment.¹⁰²

98. *Id.* at 917-18.

99. *Id.* at 918.

100. *Id.* at 919.

101. Although the Quebecs had not directly challenged this ruling, they had alleged all parties were aware the roof leaked at the time the lease was executed and that Parks was obligated under the lease to repair the roof to the satisfaction of the Quebecs by August 1, 1986. Thus the court decided to address this issue since it was “raised to some degree.” *Id.* at 918.

102. *Id.*

The Quebecs also contended that the damages awarded by the trial court were excessive because they included the cost of repairing the roof, which the lessee was not obligated to pay. In rejecting this contention, the court observed that while the amount of damages awarded by the trial court was identical to the bid from McGath Construction to replace the roof, ceiling and carpet (\$12,170), the damages were "sustainable under a theory of loss of rental value."¹⁰³ Davis, who operated a tavern on the leased premises, was forced to vacate the half of the building containing a stage and dance floor seating 120. Davis continued to pay the full amount of the rent, which totalled \$25,000 from the date of the abandonment to the date of trial. The Quebecs could have requested special findings of fact and conclusions of law and expressed their perception of error through a motion to correct errors. Since they did not, the court refused to reverse the award of damages "based on no more than an inference from a coincidence."¹⁰⁴

Finally, the Quebecs argued that Davis should not be awarded damages for the cost of replacing the ceiling and carpet because these were consequential damages that the tenant could have avoided. The Quebecs quoted *Sigsbee v. Swathwood*, for the rule that: "[D]amages for injury to the tenant or his property from continued failure to make repairs cannot ordinarily be recovered because under the rule of avoidable consequences the tenant should have made the repairs himself and recovered their cost from the landlord."¹⁰⁵ In response, Davis cited *T & W Building Co. v. Merrillville Sport & Fitness, Inc.*, which held that: "[W]here the party whose duty it is to perform has equal opportunity for performance and equal knowledge of consequences of nonperformance he cannot, while the contract is subsisting, be heard to say that plaintiff might have performed for him."¹⁰⁶

In affirming the judgment, the court of appeals observed that *Sigsbee* involved "minor repairs at 'slight expense,' such as replacing 'a few window panes,' not replacing a major component of a building, such as an entire roof."¹⁰⁷ Under the circumstances the court found "the rule from *T & W Bldg. Co.* more appropriate than that from *Sigsbee*."¹⁰⁸ Where a dispute of this nature arises, the court found it more reasonable to hold that the party with the greater interest in the property, the

103. *Id.* at 920.

104. *Id.* at 919-20.

105. *Id.* at 920 (quoting *Sigsbee v. Swathwood*, 419 N.E.2d 789, 798 (Ind. Ct. App. 1981)).

106. *Quebe*, 586 N.E.2d at 920-21 (quoting *T&W Bldg. Co. v. Merrillville Sport & Fitness, Inc.*, 529 N.E.2d 865, 867 (Ind. Ct. App. 1988), *trans. denied*).

107. *Quebe*, 586 N.E.2d at 921.

108. *Id.*

lessor, should step forward to prevent further deterioration. The judgment was affirmed.¹⁰⁹

B. Security Deposits Act

Indiana enacted a Security Deposits Act in 1989.¹¹⁰ The centerpiece of the Act is the notice provision, requiring the landlord, within forty-five days after termination of the rental agreement and delivery of possession, to give written notice to the tenant if the landlord is holding any portion of the security deposit.¹¹¹ Failure of the landlord to comply with the written notice of damages requirement constitutes an agreement by the landlord that no damages are due, and the landlord must remit the full security deposit to the tenant.¹¹² Two decisions during this survey period addressed the landlord's duty to provide written notice of reasons for not returning the tenant's security deposit.

In *Skiver v. Brighton Meadows*,¹¹³ the court of appeals concluded that the failure of the landlord to comply with the notice of damages provisions of the Security Deposits Act barred the landlord's recovery of past due rent. The tenant (Skiver) signed a one-year lease ending April 30, 1991. Skiver gave the landlord (Brighton Meadows) a security deposit of \$250 and an additional \$100 pet security deposit. In June 1990, Skiver vacated the premises, paying only \$100 for the month of June and nothing thereafter. Brighton Meadows kept the security deposit but did not send Skiver the required written notice listing the obligations to which the security deposit was being applied. The landlord filed suit in a small claims court in November 1990, for back rent and attorney fees, and requesting judgment for \$3000 (the jurisdictional limit of the court). The trial court awarded the landlord \$2650 (\$3000 minus the \$350 security deposit). The trial court concluded that the landlord was not required to send the written notice of damages since the landlord had not alleged any damage to the apartment unit.¹¹⁴

In reversing the trial court, the court of appeals concluded that the forty-five day notice to the tenant was required. Section 14 of the Act provides:

109. *Id.*

110. IND. CODE §§ 32-7-5-1 to -19 (Supp. 1992).

111. *Id.* § 32-7-5-12 (Supp. 1992). Such notice shall include an itemized list of damages claimed for which the security deposit is being applied, including the estimated cost of repair for each damaged item. The list must be accompanied by a check for the difference between the damages claimed and the amount of the security deposit held by the landlord. *Id.* § 32-7-5-14 (Supp. 1992).

112. *Id.* § 32-7-5-15 (Supp. 1992).

113. 585 N.E.2d 1345 (Ind. Ct. App. 1992).

114. *Id.* at 1345-46.

In case of damage to the rental unit *or other obligation against the security deposit*, the landlord shall mail to the tenant, within forty five (45) days after the termination of occupancy, an itemized list of damages claimed for which the security deposit may be used as provided in section 13 of this chapter.¹¹⁵

Because the landlord failed to provide written notice to the tenant, “no damages are due, and the landlord must remit to the tenant immediately the full security deposit.”¹¹⁶

While this decision may come as a shock to landlords who have not read the Security Deposit Act closely, the decision appears to follow both the letter and spirit of the Act. The entire security deposit is to be returned to the tenant except for any amount applied to obligations against the security deposit as itemized in a written notice delivered to the tenant together with a check for the amount due the tenant within forty-five days after termination of the rental agreement and delivery of possession.¹¹⁷ Since this was not done, the tenant was entitled to the return of his full security deposit and the landlord was not entitled to any damages.¹¹⁸

One problem not addressed by the court is the variation in the wording of the sections of the Act with regard to when the forty-five day period for giving the notice to the tenant begins to run. Under section 12(a) the forty-five day period begins upon “termination of the rental agreement and delivery of possession.” In sections 14 and 15 it begins at “termination of occupancy,” and in section 16 it begins at “termination of the tenancy.”¹¹⁹ If written notice must be given to the tenant within forty-five days after termination of occupancy, then it is possible that the landlord would be required to give notice within forty-five days of the abandonment of the premises by the tenant. On the other hand, if the written notice is not required until forty-five days after “termination of the rental agreement” or “termination of the tenancy,” then it can be argued that the unilateral action of the tenant in vacating the premises prematurely should not start the forty-five day period running. Non-payment of rent or abandonment by the tenant does not automatically terminate a rental agreement.¹²⁰

115. IND. CODE § 32-7-5-14 (Supp. 1992) (emphasis added). One of the obligations for which the landlord may withhold the security deposit is “all rent in arrearage under the rental agreement, and rent due for premature termination of the rental agreement by the tenant.” IND. CODE § 32-7-5-13 (Supp. 1992).

116. IND. CODE § 32-7-5-15 (Supp. 1992).

117. *Id.* § 32-7-5-12(a) (Supp. 1992).

118. *Skiver*, 585 N.E.2d at 1347.

119. IND. CODE §§ 32-7-5-12, -14-16 (Supp. 1992).

120. *See, e.g., CUNNINGHAM ET AL., supra* note 25, at 278-80.

In the second decision, *Duchon v. Ross*,¹²¹ the tenants (Duchon and McIlvenna) leased a house from the landlords (Ross and Harris) for a term of one year and paid a \$490 security deposit. The tenants dealt almost exclusively with Ross with regard to the house.¹²² They negotiated the lease with her, sent her the rental payments, and contacted her when problems arose. The tenants were notified by Ross that when the lease expired on February 28, 1991, it would not be renewed. The tenants vacated and advised Ross to send all future correspondence to Duchon's business address. On March 8, 1991, Ross sent Duchon a letter stating that a carpet needed to be shampooed, that the locks had been re-keyed, that a washer and dryer were missing, and that the backyard had been damaged by vehicle parking and needed to be reseeded. The letter advised the tenants that once the costs were ascertained they would receive a final accounting. A dispute arose as to the damages, and the tenants filed suit to recover their security deposit, attorney fees and court costs. The landlords counterclaimed for damage to the house. The tenants moved for summary judgments based on the landlords' failure to comply with the notice requirement of the Security Deposit Act. The trial court denied the motion and certified the denial of the summary judgment for interlocutory appeal.¹²³

On appeal, the court observed that this was the first time the sufficiency of the written notice had been questioned. The court began with a discussion of the duties of the landlord to return the security deposit to the tenant under the Act. It observed that the landlord must return the entire security deposit except for any amount applied to the payment of accrued rent, damages that the landlord has or will reasonably suffer by reason of the tenant's noncompliance with the law or the rental agreement, and unpaid utility or sewer charges the tenant is obligated to pay under the rental agreement: "all as itemized by the landlord in a written notice delivered to the tenant together with the amount due within forty-five (45) days after termination of the rental agreement and delivery of possession."¹²⁴

With regard to damages to a rental unit or any ancillary facility that are not the result of ordinary wear and tear, the notice is to include the estimated cost of repair for each damaged item and the amount the landlord intends to assess the tenant. The itemized list must be accompanied by a check for the difference between the damages claimed and

121. 599 N.E.2d 621 (Ind. Ct. App. 1992).

122. *Id.* at 622. The facts indicate that both Duchon and Ross are attorneys at law. *Id.* n.1.

123. *Id.* at 622-23.

124. IND. CODE § 32-7-5-12(a) (Supp. 1992).

the amount of the security deposit held by the landlord.¹²⁵ The landlord's failure to comply with the notice of damages requirement "constitutes agreement by the landlord that no damages are due"¹²⁶ and the landlord is liable to the tenants for the amount of the security deposit withheld together with reasonable attorney fees and court costs.¹²⁷

Next, the court examined Ross' letter of March 8, 1991, because it was the only letter sent within forty-five days after termination of the tenancy, to see if it complied with the statute. The tenants point out that the letter did not include the estimated cost of repair for each damaged item and was not accompanied by a check for the difference between the damages claimed and the security deposit. The court agreed that the statute is clear and unambiguous, and that the letter failed to provide the itemized estimated costs of repair and payment of the excess deposit. The court refused to accept the landlords' defense that the dispute over the cost of repairs relieved them of this statutory duty.¹²⁸ In addition, the landlords argued that section 12 does not prevent the landlord or tenant from recovering "other damages" to which either is entitled. However, the court observed that under section 15 there are no "other damages" unless the security deposit is returned or the statutory notice is sent to the tenant. The judgment was reversed with directions to the trial court to enter summary judgement for the tenants and to assess costs and attorney fees.¹²⁹

V. MORTGAGEE: CONTRACTUAL DUTIES

In *Wehling v. Citizens National Bank*,¹³⁰ the Wehlings purchased a parcel of property in Upland, Indiana, and financed the purchase through the United Bank of Upland, Citizens National Bank's predecessor in interest. The Wehlings paid the bank a fee to record the deed. The Bank recorded the deed, but failed to place the Wehlings' mailing address in the transfer book. Instead, it listed the address of the property. After paying the May 1981 real estate taxes in May 1982, the Wehlings assumed the Bank had set up an escrow account and was paying the real estate taxes as indicated by the terms of the mortgage. In fact, the Bank had not set up an escrow account nor had it paid the real estate taxes. A notice of delinquency was mailed by the Grant County Auditor to the address listed in the transfer book, and, in July of 1984, a notice of

125. *Id.* § 32-7-5-14 (Supp. 1992).

126. *Id.* § 32-7-5-15 (Supp. 1992).

127. *Id.* § 32-7-5-16 (Supp. 1992).

128. *Duchon*, 599 N.E.2d at 625.

129. *Id.* at 624-25.

130. 586 N.E.2d 840 (Ind. 1992).

tax sale was sent by mail to the address of the property and the address of the former owner. The Wehlings did not receive either of these notices, and the property was subsequently purchased at a tax sale on August 13, 1984. There was no indication that the Wehlings were aware a tax deed had been executed by the county auditor on October 28, 1986. Apparently, the Wehlings first became aware in 1987, when they attempted to sell the property, that the property had been sold for nonpayment of taxes. The Wehlings then filed a complaint attempting to quiet title against the tax sale purchasers and to set aside the deed. The Bank was added in an amended complaint alleging negligent recording of the deed and failure to escrow and pay the taxes. The trial court entered a summary judgment in favor of the Bank, finding that it had breached no duty to the Wehlings. The court also granted a summary judgment in favor of the purchaser at the tax sale.¹³¹

The court of appeals affirmed the summary judgment in favor of the Bank on the ground that the statute of limitations had run on the Wehlings' claim. The Indiana Supreme Court granted transfer. On the statute of limitations issue the court of appeals concluded that the applicable six year statute of limitation¹³² had expired between the recording of the deed and the filing of the complaint. The supreme court, however, agreed with the Wehlings' contention that the "discovery rule" applied and the statute begins to run when the resultant damage of a negligent act is "susceptible of ascertainment."¹³³ The court concluded that the "discovery rule" does not differ from the "ascertainment rule" announced in earlier Indiana decisions, and that "the cause of action of a tort claim accrues and the statute of limitations begins to run when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another."¹³⁴

With regard to the summary judgment issue, the trial court had held that the duty to provide the county auditor with the correct mailing address rested solely with the owner. The supreme court disagreed, holding that the trier of fact could reasonably find that when the Bank contractually agreed to record the deed for a fee, this duty included providing the county auditor with the Wehlings' correct mailing address by placing it in the transfer book. Furthermore, the court determined that the question of negligence in failing to escrow money for the payment of the real estate taxes was a question of fact. Language in the mortgage

131. *Id.* at 840-41.

132. IND. CODE § 34-1-2-2(1) (Supp. 1992).

133. *Duchon*, 586 N.E.2d at 842-43.

134. *Id.* at 842-43.

specifically provided for such an escrow arrangement. Thus these factual issues precluded the entry of summary judgment. The opinion of the court of appeals was vacated and the case was remanded to the trial court.¹³⁵

VI. REAL ESTATE CLOSINGS: CONTRACTUAL DUTIES¹³⁶

In *Lawyers Title Insurance Corp. v. Pokraka*,¹³⁷ Joseph and Joan Pokraka (collectively "Pokraka") sold a two flat apartment building to Dwaine Paradis. Pokraka agreed to accept back a mortgage which would be secondary to a \$5000 first mortgage needed by Paradis to finance part of the purchase price. The \$5000 was to be paid to Pokraka immediately following the closing. Employees of Lawyers Title Insurance Corporation, including Antonovitz, handled the closing. Sometime prior to the closing, Paradis asked Lawyers Title to delay the recording of Pokraka's mortgage for a period of ninety days. Antonovitz authorized the delay. During this period Paradis obtained a mortgage in the principal amount of \$15,000 from a commercial lender which was recorded before the Pokraka mortgage. When Paradis stopped making payments on the commercial mortgage Pokraka was forced to obtain a commercial mortgage to pay off the one taken by Paradis. Pokraka then filed this suit, and the trial court awarded a judgment against Antonovitz and Lawyers Title of \$18,985.34 compensatory damages and \$50,000 punitive damages.¹³⁸

In a memorandum decision, the court of appeals reversed the trial court's judgment against Lawyers Title. The court found no misrepresentation of past or existing facts which amounted to fraud, that Pokraka had no right to rely on the representations, and that no damage was sustained as a result of any misrepresentation because Pokraka had agreed to take a second mortgage. The supreme court granted transfer because it concluded Pokraka is entitled to the judgment.¹³⁹

Lawyers Title argued that the trial court's conclusions were contrary to law because neither theory was properly pleaded, no duty was breached, and the elements of fraud or breach of contract were not proven. The supreme court observed that allegations of fraud appeared in the complaint and that Pokraka's pre-trial "contentions" made specific reference

135. *Id.* at 841-43.

136. In addition to the case discussed under this topic, two other decisions discussed earlier also involve the contractual duties of the parties at a real estate closing. *See supra* text accompanying notes 70-85, 130-35.

137. 595 N.E.2d 244 (Ind. 1992).

138. *Id.* at 245-46.

139. *Id.*

to an oral contract which obligated Lawyers Title to follow the customs of title companies in northwest Indiana when acting as a closing agent. Thus, contract and fraud were part of Pokraka's case.¹⁴⁰

The court first examined the question of whether Lawyers Title was obligated to promptly record Pokraka's mortgage. Expert testimony established that it was customary for title insurance companies in northern Indiana to record as soon as possible after closing all legal documents requiring recordation. Thus, the trial court found it was Lawyers Title's duty to promptly record the mortgage or notify Pokraka of any delay. The court also rejected Lawyers Title's contention that since Pokraka had agreed to a second mortgage no damages resulted from the delay. Pokraka had agreed to a first mortgage in the amount of \$5000, not \$15,000. Had the mortgage been recorded immediately, Pokraka would have been protected from a superior mortgage in excess of \$5000. Because the relationship between Lawyers Title and Pokraka was contractual, its failure to fulfill its obligations gave rise to an action for breach of contract.¹⁴¹

The court agreed with Lawyers Title that the trial court had erroneously concluded that fraud occurred. There was no evidence that Antonovitz acted with the intent to mislead Pokraka. Nevertheless, Pokraka was still entitled to judgment because the trial court's judgment may be affirmed under any legal theory supported by the findings even if different than the one used by the trial court. Here the trial court's findings support the conclusion that Lawyers Title breached its oral contract to record the mortgage promptly or to advise Pokraka of the delay.¹⁴²

Finally, the court reversed the award of punitive damages, noting that punitive damages generally are not recoverable for breach of contract. There was no finding that Antonovitz acted maliciously, fraudulently, oppressively or with gross negligence.¹⁴³

VII. RIPARIAN RIGHTS

The natural resources and scenic beauty of Indiana are a public right. The public has a vested right to the preservation and protection of all public freshwater lakes in their present state and the right to use such waters for recreational purposes. The state has full power and control of all public freshwater lakes in trust for the recreational use of all its citizens, and no person owning lands abutting a public freshwater

140. *Id.* at 247-48.

141. *Id.* at 248.

142. *Id.* at 249.

143. *Id.* at 250.

lake has an exclusive right to use such waters or any part thereof.¹⁴⁴ At the same time, Indiana recognizes riparian rights of owners of lands bordering freshwater lakes.¹⁴⁵ These competing interests of the riparian landowner and the right of the public to use the waters often conflict. Such a conflict occurred during this survey period and the court provided additional guidelines for resolving future disputes.

In *Zapffe v. Srbeny*,¹⁴⁶ the owners of land adjacent to Bass Lake (the Zapffes) sought an injunction to prevent the defendants (collectively referred to as "Srbeny") from interfering with their riparian rights. The trial court enjoined Srbeny from installing a pier on the Zapffes' riparian tract, but refused to rule with regard to the legality of Srbeny's boat mooring devices located in the lake beyond the Zapffes' pier. This was more than a dispute between two riparian owners—it involved the rights of the public to use freshwater lakes for recreational purpose. The State of Indiana, through its Department of Natural Resources (DNR), should make the first determination regarding the public right to use Indiana's freshwater lakes for recreational purposes, including the location of boat moorings and no judgment should be issued on this point without the State being made a party.¹⁴⁷

The trial court defined the Zapffes' riparian rights as an extension of their boundary line "to a distance of fifty (50) feet out from the meander line of Bass Lake into the waters of Bass Lake." The facts indicate that none of the boat moorings are closer than 100 to 120 feet from the shore. In affirming the decision of the trial court, the court of appeals observed that in *Bath v. Courts*,¹⁴⁸ the court recognized that the onshore boundaries of the riparian owner extend into the lake in a line perpendicular to the shore where the shoreline approximates a straight line and that, should the lake naturally recede, title to the new land would vest in the riparian owner by the extension of their shore boundaries. While the court in *Bath* did not indicate how far into the lake the riparian rights extend, in *Stoner v. Rice*,¹⁴⁹ it was held that riparian rights do not extend to the middle of the lake. The court agreed with Srbeny's position that *Bath* proscribes the extension of the riparian

144. IND. CODE § 13-2-11.1-2 (1988).

145. E.g., *Stoner v. Rice*, 22 N.E. 968 (Ind. 1889); *Bath v. Courts*, 459 N.E.2d 72 (Ind. Ct. App. 1984). Indiana Code § 32-4-2-5 allows riparian owners to build "piers, wharves, docks or harbors in aid of navigation and commerce" on the riparian owners premises or "upon the submerged lands beneath the waters." IND. CODE § 32-4-2-5 (Supp. 1992).

146. 587 N.E.2d 177 (Ind. Ct. App. 1992).

147. *Id.* at 178.

148. 459 N.E.2d at 72.

149. 22 N.E. at 968.

tract to a point where it would interfere with the use of the lake by others. However, the court of appeals observed that the *Bath* decision does not suggest the location of the "finite point."¹⁵⁰

The Zapffes argued that the riparian tract should be extended to the five foot level of the lake because the five foot level would be necessary to safely navigate some boats belonging to the Zapffes' guests. In rejecting this contention, the court noted that there was no evidence in the record to support this claim. The claim is even more questionable in light of the fact that the Zapffes currently do not maintain a pier.¹⁵¹

The Zapffes next argued that the riparian rights should extend 200 feet from shore, noting that Indiana Code section 14-1-1-29 requires that no person operate a motorboat within 200 feet of the shoreline of a lake or channel 500 feet or more wide except for trolling or for leaving or approaching a dock, pier, wharf or the shore of such lake or channel.¹⁵² The court was quick to point out, however, that the statute does not totally prohibit a boat from operating within 200 feet of shore, and extending riparian rights 200 feet from the shoreline would clearly interfere with other persons' use of the lake.¹⁵³

Instead of a rigid formula for determining the exact location of riparian rights by distance or depth, the court indicated that a "reasonableness" test might be employed, taking into consideration such factors as water level, number of riparian owners, purpose of the pier, and effects on other users. The court observed that in this case other riparian owners had installed piers, none of which extended more than fifty feet into the lake. Therefore, the court concluded that under a reasonable use test the trial court did not err in fixing the boundary of the Zapffes' riparian tract at a length of fifty feet from the meander line of Bass Lake. Thus, the boat moorings did not encroach upon the Zapffes' riparian rights.¹⁵⁴

Finally, the court refused to address the Zapffes' claim that Indiana Code sections 13-2-4-5 and 13-2-11.1-2¹⁵⁵ prohibit non-riparian owners from maintaining piers or boat moorings in the lake bed. Only the State, acting through the DNR, has the authority to enforce these statutes. The court expressed no opinion on whether the Srbenys' boat moorings encroached upon the public's rights in the waters of Bass Lake since the Zapffes lacked standing to raise this issue.¹⁵⁶

150. *Zapffe*, 587 N.E.2d at 179-80.

151. *Id.* at 180.

152. IND. CODE § 14-1-1-29 (Supp. 1992).

153. *Zapffe*, 587 N.E.2d at 180-81.

154. *Id.* at 181.

155. IND. CODE §§ 13-2-4-5, -11.2-2 (1988).

156. *Id.*

1992 Developments in Indiana Taxation

LAWRENCE A. JEGEN, III*

JOHN R. MALEY**

INTRODUCTION

Several significant developments occurred in Indiana tax law and practice during the survey period. The Indiana Tax Court rendered several important opinions on jurisdictional matters, including the scope of the Tax Court's small claims docket, and the Tax Court's jurisdiction to hear certain claims brought pursuant to 42 U.S.C. § 1983.¹ In addition, a number of key decisions concerning tax sales of real property were issued by the Indiana Supreme Court, the Indiana Court of Appeals, and the Indiana Tax Court. Finally, the Indiana Supreme Court showed substantial deference to the Indiana Tax Court, while debate ensued over whether the Tax Court's decisions should be subject to review by the Indiana Supreme Court as originally designed in the Tax Court's enabling statute, or, instead, whether the Indiana Court of Appeals should review such cases.

I. PROCEDURAL MATTERS

A. Jurisdictional Issues

In *Harlan Sprague Dawley, Inc. v. Indiana Department of State Revenue*,² Judge Fisher addressed the important issue of whether the Tax Court has subject-matter jurisdiction over a claim under 42 U.S.C. § 1983 relating to the original tax appeal. The issue arose because of the potential to recover attorneys' fees under 42 U.S.C. § 1988 for prevailing parties in § 1983 cases. Since the United States Supreme Court's decision in *Dennis v. Higgins*,³ which held that Commerce-Clause

* Thomas F. Sheehan Professor of Tax Law and Policy, Indiana University School of Law—Indianapolis. B.A., Beloit College; M.B.A., J.D., University of Michigan; LL.M., New York University.

** Associate, Barnes & Thornburg, Indianapolis; Adjunct Professor, Indiana University School of Law—Indianapolis. B.A., 1985, University of Notre Dame; J.D. (summa cum laude), 1988, Indiana University School of Law—Indianapolis. Law Clerk to the Honorable Larry J. McKinney, United States District Court, Southern District of Indiana, 1988-90.

1. 42 U.S.C. § 1983 (1988).

2. 583 N.E.2d 214 (Ind. T.C. 1991).

3. 111 S. Ct. 865 (1991).

cases are actionable under § 1983 and thus can provide the basis for fees under § 1988,⁴ many tax practitioners have added § 1983 claims to their original tax appeals in the Indiana Tax Court. The taxpayer in *Harlan Sprague* did just this, and the Department of Revenue moved to dismiss for want of jurisdiction.

Judge Fisher denied the motion,⁵ reasoning first that only the Tax Court has jurisdiction over original tax appeals and that in determining a § 1983 claim appended to an original tax appeal, the § 1983 issues would arise under Indiana's tax laws sufficient to confer jurisdiction. Judge Fisher added that he has construed the Tax Court's overall jurisdiction broadly, and that such a construction is consistent with the legislature's intent to avoid different county court interpretations of state tax issues.⁶

Judge Fisher then ruled that the Tax Injunction Act, 28 U.S.C. § 1341, does not prohibit the Tax Court from exercising jurisdiction.⁷ He reasoned that this federal provision limiting the jurisdiction of United States district courts simply did not apply here. He then rejected the Department's argument of "equitable restraint" and dismissed the contention that Indiana's tax laws provided the exclusive remedy. Henceforth, the rule in the Indiana Tax Court is that § 1983 claims that arise out of the same common nucleus of operative facts as the original tax appeal may be prosecuted in the Indiana Tax Court. Practitioners should thus consider this additional theory of relief, and the possible attorneys' fees that might come with it, in each original tax appeal. Careful research on such § 1983 issues is advised, however, as this is an area replete with subtle difficulties.

In *Sherry Designs, Inc. v. State Board of Tax Commissioners*,⁸ the Indiana Tax Court dismissed an original tax appeal for failure to meet all jurisdictional requirements.⁹ The taxpayer sought to appeal an adverse final determination of the State Board of Tax Commissioners, and timely filed its petition with the Tax Court. However, the Tax Court's jurisdictional statute for such appeals also requires notice of the appeal to be served on the State Board and requires that the Indiana Attorney General and the local assessor be served with a copy of the complaint within forty-five days of the Board's final determination.¹⁰ The taxpayer wrote the local assessor and the Indiana Attorney General advising of

4. *Id.* at 868-73.

5. 583 N.E.2d at 217-18.

6. *Id.* at 216-19.

7. *Id.* at 220.

8. 589 N.E.2d 285 (Ind. T.C. 1992).

9. *Id.* at 286.

10. IND. CODE § 6-1.1-15-5 (1988 & Supp. 1992).

the appeal, but neither communication included a copy of the complaint and thus technically violated the jurisdictional statute.

Judge Fisher held that this was fatal to the appeal,¹¹ relying on Indiana Code section 33-3-5-11(a) (1988), which states: "If a taxpayer fails to comply with any statutory requirement for the initiation of an original tax appeal . . . the tax court does not have jurisdiction to hear the appeal."¹² Judge Fisher rejected the taxpayer's "substantial compliance" argument, noting that the letters to the assessor and the Attorney General did not even reference the taxpayer, let alone the nature of the claim.¹³

Thus, Judge Fisher did not need to decide whether the doctrine of substantial compliance applied in this setting, for even if it did, the doctrine had not been met. The lesson for practitioners, of course, is to ensure that the jurisdictional requirements for pressing a claim in the Tax Court are strictly followed. If they are not, the doctrine of substantial compliance can still be argued if the facts support it, but it is unclear for now whether the Tax Court will accept this legal doctrine.

In *Leehaug v. State Board of Tax Commissioners*,¹⁴ the Tax Court addressed the scope of its small claims docket. Under Indiana Code section 33-3-5-12, a small claims docket was contemplated as follows:

The tax court shall establish a small claims docket for processing:

(1) claims for refunds from the department of state revenue that do not exceed . . . \$5,000 for any year; and

(2) appeals of final determinations of assessed value made by the state board of tax commissioners that do not exceed . . . \$15,000 for any year.¹⁵

Indiana Tax Court Rule 16 then defines the term "small tax case" to include "an appeal of a final determination of assessed value made by the State Board of Tax Commissioners that does not exceed \$15,000 for any year."¹⁶ The issue in *Leehaug* was whether, under this statute and rule, an appeal of a final determination of assessed value exceeding \$15,000 could be a small tax case where the taxpayers did not seek to reduce the assessed value by more than \$15,000.

Judge Fisher found the statute and rule ambiguous, and thus relied on principles of statutory construction to conclude that it is the amount

11. 589 N.E.2d at 286.

12. *Id.* (quoting IND. CODE § 33-3-5-11(a) (1988)).

13. *Id.*

14. 583 N.E.2d 211 (Ind. T.C. 1991).

15. IND. CODE § 33-3-5-12(a) (1988).

16. IND. R. T.C. 16.

at issue, not the total assessed value, that should govern.¹⁷ He observed that Indiana statutes that are generally applicable to civil small claims cases similarly focus on the amount in dispute, and further reasoned that the consequences of applying a different rule would be unsatisfactory. He explained:

Applying the State Board's interpretation of IC 33-3-5-12(a)(2) and Indiana Tax Court Rule 16(A) would deny the small claims process to taxpayers challenging State Board assessments on any property with an assessed value greater than \$15,000. 'Assessed value' is defined as: "an amount equal to . . . 33 1/3% of the true tax value of property." Ind. Code § 6-1.1-1-3. Thus, a property with an assessed value of \$15,000 would have a true tax value of approximately \$45,000. The small claims process provides inexpensive access to the courts because the services of an attorney are generally not required. The imposition of a \$15,000 assessed value ceiling would deny the benefits of the small claims process to taxpayers with modestly valued property, even in cases where the amount of assessed value in dispute is small.¹⁸

Thus, after *Leehaug* it is the amount in dispute, not the assessed value of the property, that determines whether the expedited small tax case rules will apply. This is a good result, because under Tax Court Rule 16 the notice of claim to be used is quite simple: service need only be made upon the Attorney General, and the Indiana Rules for Small Claims, which generally apply to civil cases in small claims courts, are incorporated by reference. Thus, for practitioners with appeals involving \$5,000 or less in a claim for refund from the Department of Revenue, or \$15,000 or less in disputed assessed value, the small tax case procedures offer simplicity, expediency, and the chance to take on such cases with minimal legal fees.

B. The Supreme Court's Role in Indiana Tax Issues

Last year's Survey Article discussed the Indiana Tax Court's emerging role as the leading judicial force in Indiana tax law.¹⁹ This is due in part to the fact that the Indiana Supreme Court no longer automatically fully reviews decisions of the Tax Court. Instead, under Rule 18 of the Indiana Rules of Appellate Procedure, the Indiana Supreme Court now

17. *Leehaug*, 583 N.E.2d at 212.

18. *Id.* at 214 (footnotes omitted).

19. Lawrence A. Jegen, III & John R. Maley, 1991 *Developments in Indiana Taxation*, 25 IND. L. REV. 1405, 1405-11 (1992).

treats petitions to review tax cases much like transfer petitions, with which the decision to accept review is discretionary with the supreme court.²⁰

Beyond Indiana Appellate Rule 18, the Indiana Supreme Court has shown varying interest in the Tax Court's decisions, and has deferred to the Tax Court's expertise in this area. For instance, in *Indiana Department of Revenue v. Caylor-Nickel Clinic*,²¹ the court expressly noted that Tax Court decisions are reviewed deferentially. After observing the general rule that summary judgment rulings are reviewed de novo on appeal, the supreme court described a different rule in appeals from the Tax Court:

As to summary judgments entered by the Tax Court, however, we will utilize a limited departure from this [de novo] standard of appellate review. When the summary judgment involves a question of law within the particular purview of the Tax Court, cautious deference is appropriate. The Indiana Tax Court was established to develop and apply specialized expertise in the prompt, fair, and uniform resolution of state tax cases. Thus upon issues of tax law, we will apply Indiana Tax Court Rule 10 which provides that "[t]he Court on appeal shall not set aside the findings or judgment of the Tax Court unless clearly erroneous."²²

The supreme court then generally described the Department's challenge on appeal and summarily concluded that the "Tax Court formulated its decision utilizing principles of statutory construction in interpreting tax statutes and regulations, [and] the Department's briefs to this Court do not persuade us that the decision of the Tax Court was erroneous."²³

A similarly brief review, though specifically discussing the issues involved, is found in *Indiana Department of State Revenue v. General Motors Corp.*²⁴ In this case, which concerned whether certain parts were exempt from sales and use tax as part of General Motors' integrated production process, as well as a separate issue concerning the payment of interest on interest itself wrongfully collected, the Indiana Supreme Court disposed of the case with deference to the Indiana Tax Court. At one point the supreme court noted that Judge Fisher had done an "excellent job of explaining" one of the issues, and concluded that his judgment should be affirmed.²⁵

20. *Id.*

21. 587 N.E.2d 1311 (Ind. 1992).

22. *Id.* at 1313 (citations omitted).

23. *Id.*

24. 599 N.E.2d 588 (1992).

25. *Id.* at 589.

The most dramatic example of this substantial deference to the Tax Court, however, comes in *Indiana Department of State Revenue v. Johnson County Farm Bureau Cooperative Ass'n*.²⁶ The complete opinion is as follows:

The Indiana Department of State Revenue appeals from a decision of the Indiana Tax Court granting Johnson County Farm Bureau Cooperative Association, Inc., a deduction for freight-out costs when computing its gross earnings under the Grain Dealer Statutes, *Ind. Code* § 6-2-1-1(1) and *Ind. Code* § 6-2.1-1-5. *Johnson County Farm Bureau Cooperative Ass'n, Inc. v. The Indiana Department of State Revenue* (1991) [Ind. Tax], 568 N.E.2d 578. A careful review of the record leads us to agree with the Tax Court's conclusions. Because the Tax Court's opinion constitutes a clear, well-reasoned analysis of the law, we affirm, adopt, and incorporate by reference the opinion of the Tax Court. *Indiana Department of State Revenue v. Wechter*, (1990), 553 N.E.2d 844.²⁷

On the other hand, in *USAir, Inc. v. Indiana Department of State Revenue*,²⁸ the Indiana Supreme Court issued a detailed opinion analyzing the sales tax issues raised. The court noted that the Tax Court's decision was entitled to a presumption of validity under Indiana Tax Court Rule 10, and after thoroughly discussing the issues, affirmed Judge Fisher's decision.²⁹

Finally, in December 1992 in *Bethlehem Steel v. Indiana Department of State Revenue*,³⁰ the Indiana Supreme Court granted its first petition for review under Indiana Appellate Rule 18. The order granting review allowed the parties to file main briefs not exceeding fifty pages, and allowed the appellant to file a twenty-five-page reply brief.³¹ Thus, *USAir* and *Bethlehem Steel* show that the Indiana Supreme Court still thoroughly reviews some decisions of the Indiana Tax Court.

Given more than seven years of experience and the deference often shown by the Indiana Supreme Court, there is no longer any doubt that the Indiana Tax Court is the leading arbiter of Indiana tax law. Thus, for practitioners, it is important to prepare cases before the Tax Court as thoroughly as possible. Judge Fisher and his two law clerks have sufficient time and resources to fully analyze the often complex tax

26. 585 N.E.2d 1336 (Ind. 1992).

27. *Id.* at 1335-37.

28. 582 N.E.2d 777 (Ind. 1991).

29. *Id.*

30. No. 49S05-9212-TA-01046 (order granting review Dec. 18, 1992).

31. *Id.*

issues raised, and the Tax Court's detailed opinions reflect that this is indeed occurring. Although review and reversal of a Tax Court decision remains possible, in light of the Tax Court's expertise in this area and the deference shown by the Indiana Supreme Court, it is apparent that most cases will not be disturbed on review.

Perhaps as a result of this deference, a bill was introduced in the Indiana General Assembly this year seeking to amend Indiana Code section 33-3-5-15 so that appeals from the Tax Court would go to the Indiana Court of Appeals rather than the Indiana Supreme Court.³² The bill did not become law, but could be introduced again in future sessions. If such a measure were enacted, presumably the deference provision of Indiana Tax Court Rule 10 would still apply, and the Indiana Court of Appeals would simply be the judicial body to exercise that deference in reviewing Tax Court decisions. In addition, although the House Bill was silent on this measure, presumably transfer to the Indiana Supreme Court could then be sought from an adverse decision of the Indiana Court of Appeals.

Particularly in cases involving the State Board of Tax Commissioners, the Tax Court acts much like an appellate court, because administrative decisions of the Board are not reviewed *de novo* by the Tax Court, and the parties are bound to the record presented at the administrative level.³³ In such cases, if the Indiana Court of Appeals reviewed Tax Court decisions, there would be three possible "appeals," as follows: (1) from State Board to Tax Court, (2) from Tax Court to Indiana Court of Appeals, and (3) from Indiana Court of Appeals to Indiana Supreme Court. Even in cases involving the Department of Revenue, in which the parties are not bound by the record developed at the administrative level, the proposed amendment would add an additional layer of appeal to the resolution of Indiana tax disputes.

The authors respectfully submit that the Indiana Supreme Court should retain its role as the final arbiter of Indiana tax law and that this important function should not be turned over to the Indiana Court of Appeals. The extra layer of review would add additional delay and expense to Indiana tax cases, and there is no obvious benefit that would be gained. Moreover, there is an apparent preference among tax practitioners for the Indiana Supreme Court to be the final check on Indiana tax issues.³⁴ The Indiana Supreme Court is certainly capable of performing

32. See H.R. 1323, 108th Gen. Assembly, 1st Reg. Sess. (1993).

33. See, e.g., *Scheid v. State Bd. of Tax Comm'rs*, 560 N.E.2d 1283 (Ind. T.C. 1990).

34. See Lawrence A. Jegen & John R. Maley, *1991 Developments in Indiana Taxation*, 25 IND. L. REV. 1405, 1409 (1992) (citing Report of the Tax Court Liaison Committee Concerning Proposed Rule Modifying Appellate Procedure in Tax Court Cases (Dec. 4, 1990)).

this role, and, although it has shown varying interest in such cases, has certainly not abandoned the area.

The authors further respectfully submit that in the cases the Indiana Supreme Court accepts for review, it should provide the bench and bar with the benefit of a thorough discussion of the issues. One benefit of such opinions is that they tend to produce better reasoned decisions.

A recent decision from the United States Supreme Court is noteworthy on this subject. The Court addressed whether a district judge's rulings on state-law issues should be reviewed deferentially.³⁵ That is to say, for example, should the Seventh Circuit review a decision on Indiana tort law from, say, Judge Barker, with deference, or should it review the legal standard *de novo*? In holding that *de novo* review is required, the United States Supreme Court expounded on the virtues of appellate review. The Court observed that trial courts have the burden of hearing witnesses and reviewing evidence, while at the same time trying to determine the applicable law. "Similarly, the logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge's legal research with memoranda and briefs."³⁶ "Thus," the Court explained, "trial judges often must resolve complicated legal questions without benefit of 'extended reflection [or] extensive information.'"³⁷

Appellate courts, on the other hand, are

structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues. As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge. Perhaps most important, courts of appeals employ multi-judge panels . . . that permit reflective dialogue and collective judgment.³⁸

The Supreme Court then quoted Justice Frankfurter, who observed many years ago that "[w]ithout adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discus-

35. *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991).

36. *Id.* at 1221.

37. *Id.* (quoting Dan T. Coenen, *To Deter or Not to Deter: A Study of Federal Circuit Court Deterrence to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 923 (1989)).

38. *Id.* (citations omitted).

sion; without adequate discussion there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions.”³⁹

The Indiana Tax Court is not as “hurried” a place as most trial courts, and there are fewer trials in this forum than in most other trial courts. Moreover, the Tax Court has the benefit of two law clerks, unlike most state trial courts. Nonetheless, there is some merit to the above precepts in this context. In creating the Indiana Tax Court, it does not appear that the legislature intended for the Tax Court to be the final arbiter of tax matters. Indeed, the Tax Court’s enabling statute provides that Tax Court decisions “may be appealed directly to the supreme court.”⁴⁰ Moreover, it does not appear that Indiana’s founders intended for trial court decisions to go unreviewed,⁴¹ because the Indiana Constitution provides the “absolute right to one appeal.”⁴²

Thus, as a matter of both law and policy, the authors of this Article submit that the Indiana Supreme Court should carefully consider all petitions for review under Appellate Rule 18. When review is granted, the Indiana Supreme Court should render a full opinion in its role as the final arbiter of Indiana tax law. It is further submitted that the Indiana Court of Appeals should not take over this role, because this would only add an additional layer of delay and expense.

II. SUBSTANTIVE ISSUES

A. Income Taxes

In *F.A. Wilhelm Construction v. Indiana Department of State Revenue*,⁴³ the Indiana Tax Court held that built-in gains recognizable for federal income tax purposes when a C corporation elects S corporation status are not taxable under Indiana’s adjusted gross income tax and supplemental income tax imposed on corporations.⁴⁴ Under federal tax laws, such built-in gains are taxable, and the taxpayer here had reported and paid those gains on its federal return. It did not report or pay such built-in gains, however, in its Indiana tax return.

The dispute centered on two Indiana tax statutes. First, Indiana Code section 6-3-2-2.8 states:

39. *Id.* (quoting *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 458-59 (1959) (dissenting opinion)).

40. IND. CODE § 33-3-5-15 (1988).

41. IND. CONST. art. VII, §§ 4, 6.

42. *Id.* art. VII, § 6.

43. 586 N.E.2d 953 (Ind. T.C. 1992).

44. *Id.* at 956.

Notwithstanding any provision of IC 6-3-1 through IC 6-3-7, there shall be no tax on the adjusted gross income of the following:

...
(2) Any corporation which is exempt from income tax under Section 1363 of the Internal Revenue Code [subchapter S corporations].⁴⁵

Second, Indiana Code section 6-3-1-17 states:

Whenever the Internal Revenue Code is mentioned in this article, the particular provisions which are referred to, together with all other provisions of the Internal Revenue Code . . . having any pertinency to the provisions specifically mentioned, shall be regarded as incorporated in this article by the reference and shall have the same force and effect as though fully set forth in this article.⁴⁶

The tension in the *Wilhelm* case stemmed from apparent conflict between the former provision's exemption of Indiana income taxation on S corporations and the latter provision's incorporation by reference of all Internal Revenue Code provisions, which would thus include I.R.C. § 1374, which taxes such built-in gains. Judge Fisher resolved this conflict in favor of the taxpayer, reasoning that the former provision was clear that S corporations are not to pay any Indiana income tax.⁴⁷ Indeed, the former provision specifically states that this rule applies, "[n]otwithstanding any provision of IC 6-3-1 through IC 6-3-7."⁴⁸ Because the incorporation provision of Indiana Code section 6-3-1-17 is, of course, included within Indiana Code 6-3-1, the statutory scheme is clear that S corporations are not to pay income tax.

B. Property Tax Sales

In *Smith v. Breeding*,⁴⁹ the Indiana Court of Appeals addressed the consequences of a county auditor's failure to record a warranty deed for personal property. Smith had purchased fifty-eight acres of land in Crawford County in 1975 by land contract, and received his tax statements at his home in Indianapolis. Smith moved in 1981 to another residence in Indianapolis, and then in 1982 moved again to a third Indianapolis residence. In 1983 Smith recorded the warranty deed with the Crawford

45. IND. CODE § 6-3-2-2.8 (1988).

46. *Id.* § 6-3-1-17 (repealed 1992).

47. 586 N.E.2d at 957.

48. IND. CODE § 6-3-2-2.8 (1988).

49. 586 N.E.2d 932 (Ind. Ct. App. 1992).

County auditor, but the auditor did not record Smith's new address or any other address. After 1984, no tax statements were delivered to Smith, Smith did not pay the 1984 and 1985 taxes, and the property was sold at a tax sale in 1987. Notice of the tax sale, and subsequently of the impending expiration of the redemption period, were sent to Smith at his prior Indianapolis address, but was returned undelivered. Smith thus did not redeem the property.

Smith later learned of the tax sale and sued to void the tax deed. The trial court denied Smith's motion for summary judgment,⁵⁰ and on interlocutory appeal the Indiana Court of Appeals affirmed.⁵¹ Writing for the court, Judge Baker first observed that the auditor had plainly violated the statutory duty to record the mailing address of the grantee of real property.⁵² This failure, however, was held not to violate due process such that the tax sale should be voided.⁵³ Smith had paid the taxes since the 1970s, and when two tax statements were mailed to his old address in 1982 and 1983 but forwarded to his correct address and those tax payments were made, Smith had the opportunity to advise the auditor of his new address. Judge Baker reasoned:

Having failed to correct the auditor's records when he knew they reflected the wrong address, we will not now hear Smith complain about the auditor's failure to record Smith's address in the transfer book. As we stated in *Clark*, "the onus is upon the property owners to insure that the auditor's records reflect the correct address" Just as the owners in *Clark* had the opportunity to correct the auditor's incorrect information, Smith had the same opportunity. Even if the auditor's omission started "the chain of events that led to the tax sale[.]" Smith could have stopped the chain of events. He did not. Accordingly, the auditor's failure to record Smith's address in the transfer book did not render the subsequent tax deed void as a matter of law.⁵⁴

The court then held that the auditor did not have any duty to search for Smith's correct address because Smith did not live in town.⁵⁵ Ad-

50. *Id.* at 934.

51. *Id.* at 935.

52. *Id.* at 935 (citing IND. CODE § 6-1.1-5-4(a)).

53. *Id.* at 936.

54. *Id.* at 937 (citations omitted) (quoting *Clark v. Jones*, 519 N.E.2d 158, 160 (Ind. Ct. App. 1988), and *Long v. Anderson*, 536 F.2d 739, 742 (7th Cir. 1976)).

55. *Id.* at 937. Where the taxpayer's address can be located from the local phone directory, the Indiana Court of Appeals had imposed such a duty. See *Elizondo v. Read*, 553 N.E.2d 849 (Ind. Ct. App. 1990). As discussed *infra*, note 58 and accompanying text, however, the Indiana Supreme Court disagreed with and vacated the Court of Appeals' holding in *Elizondo*.

ditionally, the court held that Smith could show no prejudice from the auditor's failure to give the redemption notice at least 30 days prior to redemption as required by statute, particularly where the notice was sent 28 days before redemption, and the tax title deed was not actually issued until 36 days after the redemption notice to Smith.⁵⁶ Finally, the court then ordered that summary judgment be entered *against* Smith because there were no issues of fact.⁵⁷

The *Smith* decision teaches the importance for property owners to ensure that their current address is on file for tax statements. Practitioners representing clients with property in addition to a principal residence should be particularly alert to this potential problem. For practitioners representing clients owning such land, when those clients change their principal residence, extra care must be taken to ensure that each county auditor where land is owned has the owner's proper mailing address.

In *Elizondo v. Read*,⁵⁸ the Indiana Supreme Court, in reversing a decision of the Indiana Court of Appeals, held that a county auditor is not required to search records unconnected with the subject property to give notice of tax sales.⁵⁹ In this case the prior owners of a recreational parcel had changed their principal residence several times, but did not give the auditor notice of their mailing address. Because the owner retains a duty to provide such information, the court held that the tax sale for failure to pay property taxes was not void.⁶⁰

The *Elizondo* decision impacted Judge Fisher's analysis in *Centrium Group v. State Board of Tax Commissioners*,⁶¹ in which penalties had been assessed by the State Board for failure to timely pay property taxes

56. 586 N.E.2d at 938.

57. *Id.* Although, from a reading of the opinion, there do not appear to be any such factual issues, it is noteworthy that the court of appeals concluded that Smith *knew* the auditor did not have his address, and that he should have corrected this as a result. It may well be that Smith's knowledge was undisputed, but the facts stated in the opinion do not make this clear. Instead, the opinion outlines that two tax statements bore Smith's old address, and that those were then forwarded to Smith at his subsequent address. It thus appears that Smith's knowledge of the incorrect address might have been *inferred* by the court of appeals.

Certainly Smith *should have known* that the auditor did not have his address, but from the facts recited in the opinion it is not clear that he actually knew this. It may well be that Smith had admitted such knowledge in court filings, but if not, then there was at least one fact that was not undisputed. It may well be that the result would be the same if it could only be said that Smith should have known of the incorrect address, but the court applied no such objective standard, and instead used Smith's presumed subjective knowledge against him.

58. 588 N.E.2d 501 (Ind. 1992).

59. *Id.* at 504.

60. *Id.* at 505.

61. 599 N.E.2d 242 (Ind. T.C. 1992).

on commercial property. The taxpayer recorded the sale agreement with the county recorder, but the county auditor was not notified of the transaction, and no entry of the new owner's mailing address was made on the transfer books. Tax statements thus did not reach the new owner, the taxes went unpaid, penalties were assessed, and the property was put up for tax sale.

The owner read the published notice, and four days later prevented the sale by paying the tax of some \$150,000 and the penalties of \$40,000. The owner then sought a refund from the State Board, which was denied. On appeal to the Tax Court, Judge Fisher held that the auditor had no duty to independently determine the owner's new address.⁶² The onus is on the taxpayer to ensure that the auditor has the correct address, and the fact that the auditor could have determined the proper address with "minimal effort" did not make the penalties illegal.⁶³ Thus, the penalties were affirmed,⁶⁴ and the owner's simple failure to give the auditor its mailing address ended up costing \$40,000 in penalties, plus attorneys' fees to litigate the matter.

In *Metro Holding Co. v. Mitchell*,⁶⁵ the Indiana Supreme Court addressed whether the change in the tax-sale redemption period from two years to one year was constitutional, and, if so, whether it could be applied retroactively. The issues arose in two consolidated cases in which real property was sold at tax sales in 1987. At the time of sale, Indiana Code section 6-1.1-25-4 provided that a property owner whose property had been sold at tax sale had two years to redeem the property. Thus, both owners would have had until 1989 to redeem.

Effective January 1, 1988, however, this statute was amended to shorten the redemption period to one year.⁶⁶ The prior owners did not redeem within one year, so if the amendment applied, their redemption rights were extinguished.

The *Metro Holding* court first held that the one-year redemption period was not unconstitutional, rejecting the prior owners' argument that the redemption period created contract rights.⁶⁷ The court then held, however, that the amendment should not apply retroactively. The general rule is that statutes will normally be applied prospectively absent compelling reasons. Because no special reasons existed for applying the change retroactively, and because the Indiana Supreme Court had held in other circumstances that the law in force at the time of sale should govern

62. *Id.* at 244.

63. *Id.*

64. *Id.*

65. 589 N.E.2d 217 (Ind. 1992).

66. IND. CODE § 6-1.1-25-4 (1988 & Supp. 1992).

67. *Metro Holding*, 589 N.E.2d at 218.

the redemption, the *Metro Holding* court applied the amendment prospectively.⁶⁸ The opinion is well-reasoned and supported by common sense and fairness. Practitioners should be aware, however, of the new one-year redemption period.

Finally, in *Leininger v. Gren*,⁶⁹ the Indiana Court of Appeals confirmed that there are only seven reasons that support an attack on title gained through a tax sale. Specifically, Indiana Code section 6-1.1-25-16 sets forth that a tax title may be defeated "only by proving" one of the following seven conditions:

- (1) The tract was not subject to the taxes,
- (2) The delinquent taxes were paid prior to sale,
- (3) The tract was not assessed for the taxes for which it was sold,
- (4) The tract was timely redeemed,
- (5) The proper county officers issued a timely certificate stating no taxes were due,
- (6) The description of the tract was so imperfect as to fail to describe it with reasonable certainty, and
- (7) Proper notice was not given to a person with a substantial interest in the tract.⁷⁰

In this case the prior owners tried to raise a condition not contained in the above statute, but the Court of Appeals held that only these seven defects can be raised.⁷¹

68. *Id.* at 219. *Accord*, *Rossman v. Dunson*, 594 N.E.2d 789 (Ind. 1992) (following *Metro Holding*).

69. 596 N.E.2d 955 (Ind. Ct. App. 1992).

70. IND. CODE § 6-1.1-25-16 (1988).

71. *Leininger*, 596 N.E.2d at 958.

Survey of 1992 Developments in Tort Law

KAREN A. JORDAN*

NEAL LEWIS**

INTRODUCTION

During this survey period, Indiana courts again took advantage of opportunities to bring Indiana tort law into the mainstream. Our courts addressed a multitude of tort-related issues in 1992. However, this Article is necessarily limited to significant developments in tort law, excluding products liability and medical malpractice law. The Article discusses recent court holdings pertaining to important tort doctrines, including the discovery rule, the fireman's rule, and the impact rule, as well as the resolution of issues stemming from Indiana's Tort Claims Act, including its application to minors and the scope of immunity for enforcement of the law. Additionally, the Article examines abrogation of the release rule in both common law and comparative fault actions. The Article then explores the related issue of whether set-off of settlement amounts is appropriate in comparative fault cases when the nonparty defense is invoked. The Article also provides guidance on how courts are applying the recently developed test for determining whether a tort duty exists and the test for determining a claimant's status in premises liability cases.

I. THE DISCOVERY RULE

In *Wehling v. Citizens National Bank*,¹ the Indiana Supreme Court ended the piecemeal transition from the "ascertainment" rule to application of the discovery rule for determining statute of limitation dates in tort actions.² Prior to the *Wehling* decision, the supreme court had been adopting the discovery rule on a case-by-case basis, limiting its

* Adjunct Faculty and Assistant Director, The Center for Law and Health, Indiana University School of Law-Indianapolis. Assistant Professor, University of Louisville School of Law (August 1993). J.D., summa cum laude, 1990, Indiana University School of Law—Indianapolis.

** Attorney-at-law, Lowe Gray Steele and Hoffman, Indianapolis. Primary practice areas include personal injury litigation (both plaintiffs and defense), and commercial and labor litigation. J.D., magna cum laude, 1990, Indiana University School of Law-Indianapolis.

1. 586 N.E.2d 840 (Ind. 1992).

2. *Id.* at 843.

rulings to the specific context of each case.³ The problem created by this approach is best illustrated by the 1991 appellate decision in *Madlem v. Arko*.⁴ In *Madlem*, the Indiana Court of Appeals supported its decision not to apply the discovery rule on the basis that the previous Indiana Supreme Court decisions applying the discovery rule had each been specifically limited to only those circumstances before the court.⁵ The supreme court's broad-based decision in *Wehling* finally closed the door on the rationale used by the court of appeals in *Madlem* to continue only narrow application of the discovery rule.

Wehling involved a claim against a bank for negligently failing to properly record the address of an owner on a property deed. The owners did not discover the omission until they attempted to sell the property and learned for the first time that the property had been sold at a tax sale. The failure to receive notice of the tax sale resulted from the omission of the owners' address from the deed.

The court of appeals held that the cause of action against the bank first accrued upon the date the deed was recorded with the address omitted.⁶ The supreme court disagreed, holding that the cause of action did not accrue, nor did the appropriate period of limitation begin to run, until the owners "knew, or in the exercise of ordinary diligence, could have discovered" the injury.⁷

In broadly adopting the discovery rule in *Wehling*, the supreme court made a heroic effort to reconcile the confusion surrounding Indiana's historical "ascertainment rule."⁸ The supreme court reasoned that Indiana's original ascertainment rule did "not significantly differ" from the new "discovery rule."⁹

Although the historical ascertainment rule is facially no different than the new discovery rule, as adopted by Indiana the rule did not explicitly

3. See, e.g., *Allied Resin Corp. v. Waltz*, 574 N.E.2d 913 (Ind. 1991) (applying the discovery rule to a products liability action); *Burks v. Rushmore*, 534 N.E.2d 1101 (Ind. 1989) (applying the discovery rule to claim for defamation); *Barnes v. A.H. Robins Co., Inc.*, 476 N.E.2d 84 (Ind. 1985) (applying the discovery rule to accrual of the date of a claim for injury from toxic exposure).

4. 581 N.E.2d 1290 (Ind. Ct. App. 1991). See also *Keesling v. Baker & Daniels*, 571 N.E.2d 562 (Ind. Ct. App. 1991) (refusing to apply a discovery rule to a claim for legal malpractice).

5. "*Burks* and *Barnes* cite but do not overrule *Shideler* and its teachings. Since both cases carefully limit their holdings to the facts before them, and *Shideler* has been precedent of longstanding, the rule in *Shideler* constitutes precedent here because it concerns professional negligence resulting only in property damage." *Madlem*, 581 N.E.2d at 1293 (discussing *Shideler v. Dwyer*, 417 N.E.2d 281 (Ind. 1981)).

6. *Wehling*, 586 N.E.2d at 842.

7. *Id.* at 843.

8. See, e.g., *Montgomery v. Crum*, 161 N.E. 251 (Ind. 1928).

9. *Id.*

contain an objective standard for determining whether an injury was discovered by a claimant. Instead, Indiana's original historical rule considered only whether the injury had occurred and was thereby "ascertainable," and not whether a claimant had an objective cause to investigate a possible, but unknown injury.¹⁰

The supreme court's decision in *Wehling* has eliminated the previous difficulties with the ascertainment rule by fully adopting the discovery rule, complete with an objective standard, as applicable to all tort actions.¹¹ Notably, although the supreme court suggested that the discovery rule applies to all tort claims,¹² too much reliance should not be placed upon the broad language of the decision given the exceptions in tort law, such as the statute of limitations in medical malpractice claims.¹³ However, it is now the law in Indiana that a tort cause of action accrues when the claimant knew of the injury or, "had he exercised ordinary diligence, could have discovered that an injury had been sustained"¹⁴ Under

10. [T]he two-year statute of limitations will not begin to run as a shield against the consequences of wrongful acts until the wrongdoer thereby accomplishes an injury to the person of another . . . (that is to say, damages susceptible of ascertainment), for not until then would the cause of action accrue to invoke the statute.

Montgomery v. Crum, 161 N.E. 251, 259 (Ind. 1928). Whether simply being "susceptible of ascertainment" included an objective standard was seemingly clarified by the subsequent supreme court decision in *Marengo Cave Co. v. Ross*, 10 N.E.2d 917, 922 (Ind. 1937) ("[T]he statute of limitations does not begin to run until the injured party discovers, or with reasonable diligence might have discovered.").

Unfortunately, the supreme court decisions after *Montgomery* and *Marengo Cave Co.* reverted to the date of actual injury, regardless of whether the plaintiff could not have known of the harm. See *Guy v. Schuldt*, 138 N.E.2d 891 (Ind. 1956); *Shideler v. Dwyer*, 417 N.E.2d 281 (Ind. 1981).

11. *Wehling*, 586 N.E.2d at 843.

12. "[T]he reasoning inherent in both decisions [previous decisions applying the discovery rule] logically applies to all tort claims." *Id.* at 842.

13. The discovery rule probably does not apply to *all* tort claims, the one notable exception being the tort of medical malpractice. The statute of limitations in medical malpractice is controlled by Indiana Code § 16-9.5-3-1 (1992), which provides that a claim is barred if not filed within two years of the wrongful act. In other words, the statute does not begin to run when the action "accrues" as in most statutes of limitations. The limitation contained in the Medical Malpractice Act would perhaps be better defined as a statute of repose, such as applies to products liability, rather than a true statute of limitations. The medical malpractice statute has been defined as an "occurrence" statute of limitations to which the discovery rule would not apply. *Yarnell v. Hurley*, 572 N.E.2d 1312 (Ind. Ct. App. 1991). However, the Act prescribes a slightly more flexible statute of limitations for minors under the full age of six, who have until their eighth birthday to file an action. See *Walker v. Rinck*, 604 N.E.2d 591 (Ind. 1992) (holding that it is up to the legislature to amend the statute of limitations in the Act if deemed appropriate in the case of preconception torts).

14. *Wehling*, 586 N.E.2d at 843.

Wehling, it is not appropriate for a trial court to consider the actual date of the alleged occurrence; rather, it is now a jury question as to when a claimant actually discovered the injury or should have discovered it based upon an evaluation of the objective criteria available to the claimant.¹⁵

II. THE FIREMAN'S RULE

The Indiana Court of Appeals twice upheld the viability of the fireman's rule, a venerable doctrine of tort law which prescribes that public safety officers "whose occupations by nature expose them to particular risks, may not hold another negligent for creating the situation to which they respond in their professional capacity."¹⁶ In Indiana, the rule is premised on three theories: the law of premises liability, the defense of incurred risk, and public policy. The fireman's rule was therefore challenged in light of the Indiana Supreme Court's decision in *Burrell v. Meads*,¹⁷ Indiana's Comparative Fault Act,¹⁸ and policy considerations.

The Indiana Supreme Court first adopted the doctrine in *Woodruff v. Bowen*,¹⁹ where the court held that firemen acting in the course of their duties enter the property of another under a license granted by law for a public purpose.²⁰ Indiana has extended the fireman's rule to police officers as well.²¹ As licensees, landowners owe public safety officers only the duty of abstaining from any positive wrongful act.²² Accordingly, public safety officers are precluded from recovering for injuries sustained in the line of duty which result from the mere negligence of a landowner.²³

Indiana courts have also applied the fireman's rule to injuries sustained when responding to off-premise situations, i.e., cases which do not involve a landowner defendant. The courts have relied upon the doctrine of

15. *Id.*

16. *Koehn v. Devereaux*, 495 N.E.2d 211, 215 (Ind. Ct. App. 1986).

17. 569 N.E.2d 637 (Ind. 1991).

18. IND. CODE § 34-4-33-1 (1988 & Supp. 1992).

19. 34 N.E. 1113 (Ind. 1893).

20. *Id.* at 1116.

21. *Koop v. Bailey*, 502 N.E.2d 116 (Ind. Ct. App. 1986).

22. *Id.* at 118.

23. Indiana's later adoption of the rescue doctrine created a dichotomy. Under the rescue doctrine, one who negligently endangers the safety of another may be held liable for injuries sustained by a third party in attempting to save the other from harm. *Neal v. Home Builders, Inc.*, 111 N.E.2d 280 (Ind. 1953). *See also* *Lambert v. Parrish*, 492 N.E.2d 289 (Ind. 1986). Thus, rescuers may recover for negligence. Yet public safety officers who are duty-bound to effect rescues are precluded from recovery under the fireman's rule. To resolve this inconsistency, Indiana courts described the fireman's rule as an exception to the liability imposed by the rescue doctrine. *Koehn v. Devereaux*, 495 N.E.2d 211, 215 (Ind. Ct. App. 1986).

incurred risk as a justification for applying the rule to off-premises situations. Generally, the doctrine of incurred risk bars recovery to a plaintiff who knowingly undertakes a risk of harm arising from the negligent or reckless conduct of the defendant.²⁴ Because public safety officers knowingly undertake the risks inherent with their jobs, the incurred risk defense supports the application of the fireman's rule to preclude recovery for injuries sustained in the line of duty in off-premises cases.²⁵

This year the court of appeals adopted the public policy rationale as additional support for the fireman's rule in *Kennedy v. Tri-City Comprehensive Community Mental Health Center, Inc.*, a case involving a landowner defendant.²⁶ In *Kennedy*, the plaintiff police officers responded to a call for assistance by a residential care facility (Tri-City). Tri-City advised the officers that a resident had been disruptive. When one of the officers reached for the resident's arm, a scuffle ensued and the officers were injured. The police officers challenged the continued viability of the fireman's rule in the wake of the supreme court's decision in *Burrell v. Meads*,²⁷ which changed the status of social guests from licensees to invitees. The police officers challenged the rule based upon the enactment of Indiana's Comparative Fault Act and public policy considerations as well.

The court rejected the officers' contention that application of *Burrell* rendered their status as that of invitees rather than licensees. The court in *Kennedy* held that, although the officers were called or "invited" by Tri-City, they were there solely in their capacities as police officers and were therefore licensees.²⁸ The court also rejected the officers' assertion that Indiana's Comparative Fault Act precludes application of the fireman's rule. Without engaging in a substantive analysis, the court upheld the rule in Indiana, in part, because of the many exceptions available to temper its use.²⁹

24. See RESTATEMENT (SECOND) OF TORTS § 496A (1965).

25. See *Sports Bench, Inc. v. McPherson*, 509 N.E.2d 233, 235 (Ind. Ct. App. 1987), *trans. denied*; *Koehn*, 495 N.E.2d at 215.

26. 590 N.E.2d 140 (Ind. Ct. App. 1992).

27. 569 N.E.2d at 643.

28. *Kennedy*, 590 N.E.2d at 142.

29. *Id.* at 143.

The rule does not preclude recovery in the following situations: where a defendant is guilty of willful or wanton misconduct, where a landowner defendant misrepresents the situation, where injury results from hidden or unanticipated perils, and where the defendant's violation of a statutory duty causes the injury. *Id.* (citing *Lipson v. Superior Court*, 644 P.2d 822 (Cal. 1982); *Armstrong v. Mailand*, 284 N.W.2d 343 (Minn. 1979); *Mahoney v. Carus Chem. Co.*, 510 A.2d 4 (N.J. 1986); *Scheurer v. Trustees of the Open Bible Church*, 192 N.E.2d 38 (Ohio 1963)). The court elected not to extend the statutory duty exception

Finally, the court in *Kennedy* rejected the officers' contention that public policy does not justify treating fire fighters and police officers differently from other public employees. The court believed that public policy favors continued viability of the rule because of the "nature of the service provided by [public safety officers], as well as the relationship between these safety officers and the public they are employed to protect."³⁰ The court did not elaborate on why the nature of the service and the relationship with the public justifies the fireman's rule.³¹

The public policy rationale, however, was further developed in *Fox v. Hawkins*, an off-premises case.³² The *Fox* court explained that it is the general public which hires, trains, and pays public safety officers, and that the general public both expects public safety officers to confront hazardous situations and benefits from that undertaking.³³ Accordingly, it is the general public which compensates public safety officers for the negligently caused injuries they sustain in the discharge of their duties through publicly-sponsored medical, disability, and pension schemes.³⁴ Moreover, according to the court, to abrogate the fireman's rule would constitute a breach of the social contract, because the poor or uninsured may then hesitate to summon officers for fear of being assessed damages, and officers may give preference to people of means to avoid exposure to uncompensated harm.³⁵

The *Fox* court provided further justification for *Kennedy's* holding that the Comparative Fault Act did not abolish the fireman's rule. In the *Fox* case, Donald Hawkins, acting in his capacity as a Marion County Deputy Sheriff, had investigated the Foxes' unattended car, which had been left partly in the motoring lane after stalling. Hawkins parked his car behind the stalled car. As Hawkins stood by the driver's door of the car, another vehicle skidded out of control and struck Hawkins' car, the Foxes' car and Hawkins. Because this was an off-premises case, the court drew upon the incurred risk rationale.

to include Tri-City's alleged breach of a promise made to the board of zoning appeals for a special use permit. *Id.* at 144.

30. *Id.* at 144-45 (quoting *Kreski v. Modern Wholesale Electric Supply*, 415 N.W.2d 178, 186-87 (Mich. 1987)).

31. Because the injuries sustained by the officers resulted from an inherent and foreseeable risk of the situation to which they responded, application of the fireman's rule was appropriate and the court affirmed the trial court's entry of summary judgment. *Id.*

32. 594 N.E.2d 493 (Ind. Ct. App. 1992).

33. *Id.* at 496.

34. *Id.* This rationale withstands scrutiny only if the public medical, disability and pension benefits fully compensate public safety officers for injuries, which is likely to be an arguable premise.

35. *Id.*

Hawkins premised his argument on the fact that the defense of incurred risk is specifically included in the Comparative Fault Act's definition of "fault."³⁶ Because the fireman's rule is based on the doctrine of incurred risk, Hawkins asserted that the rule had been implicitly abrogated as a result of the Act's enactment. The court rightfully noted that the fireman's rule is based only in part on the doctrine of incurred risk; specifically, the incurred risk foundation supports the application of the rule in off-premises cases only. Because the claimant's argument would only support eradication of the rule in some situations, the court held that the Comparative Fault Act did not abolish the fireman's rule.³⁷ In sum, it is fair to conclude that the fireman's rule has become solidly entrenched as a viable doctrine of Indiana tort law after the decisions in *Kennedy* and *Fox*.

III. THE RELEASE RULE

A. Abrogation of the General Rule

In *Huffman v. Monroe County Community School Corp.*,³⁸ the Indiana Supreme Court seized the opportunity to abrogate the much maligned release rule.³⁹ Although the *Huffman* case involved a common law negligence claim against a governmental entity, the court broadened its holding, abrogating the release rule to include both common law actions⁴⁰ and actions subject to Indiana's Comparative Fault Act.⁴¹ Prior to *Huffman*, the common law of Indiana dictated that the release of one joint tortfeasor operated as a release of all other joint tortfeasors.⁴² The release rule operated even where the parties had entered into an agreement specifically reserving rights of action against other tortfeasors.⁴³

36. IND. CODE ANN. § 34-4-33-2(a) (West 1992).

37. *Fox*, 594 N.E.2d at 497. The eradication of [the incurred risk theory] would therefore affect only off-premises cases, and we would then have two sets of rules, one for public safety officers injured in on-premises situations, and one for public safety officers injured in off-premises situations. We could not accept such a situation. *Id.*

38. 588 N.E.2d 1264 (Ind. 1992).

39. Although the appellate court clearly disfavored the Release Rule, if felt constrained to follow precedent. *Huffman v. Monroe County Community Sch.*, 564 N.E.2d 961, 965 (Ind. Ct. App. 1991), *rev'd*, 588 N.E.2d 1264, 1267 (Ind. 1992) ("In any event, regardless of whether the Release Rule has ever constituted anything but an abomination in the law, we must follow our Supreme Court's precedence of *Belew*, *supra* and *Cooper*, *supra*.").

40. *Huffman*, 588 N.E.2d at 1267. For a list of actions exempted from the Comparative Fault Act, *see infra* note 50.

41. IND. CODE § 34-4-33-1 to -13 (1988 & Supp. 1992).

42. *Huffman*, 588 N.E.2d at 1266.

43. *See, e.g., Cooper v. Robert Hall Clothes, Inc.*, 390 N.E.2d 155 (Ind. 1979).

Historically, the release rule was justified based upon: 1) a fictional treatment of joint tortfeasors as one entity; and 2) an equitable attempt to prevent unjust enrichment, which could occur through multiple settlements based upon one injury.⁴⁴ The supreme court in *Huffman* found both of these underlying purposes no longer applicable in actions subject to the Comparative Fault Act.⁴⁵ The Indiana Comparative Fault Act requires a jury to allocate a percentage of fault to each tortfeasor whose individual actions combine to produce the injury of the plaintiff.⁴⁶ First, the court explained that the Act's requirement that the degree of fault be allocated among joint tortfeasors has superseded the common law concept which views joint tortfeasors as one entity.⁴⁷ Second, the supreme court observed that allocation of fault under the Act prohibits compensation for more than 100% of a plaintiff's damages.⁴⁸ Therefore, the other primary purpose of this rule—preventing unjust enrichment—is no longer a valid concern, because comparative fault prevents a plaintiff from receiving more than complete satisfaction for an injury.⁴⁹

Logically, destruction of the twin rationales for the release rule under the Comparative Fault Act did not necessitate abrogation of the release rule in actions which continue to be subject to the common law rather than comparative fault. However, the Indiana Supreme Court brought Indiana law a courageous step forward by also abrogating the release rule as to common law actions.⁵⁰

The court noted the development of covenants not to sue, covenants not to execute, and loan agreements as a means of avoiding the harshness of the release rule.⁵¹ The "common law has reacted to these creative agreements by providing for their use in civil trials so as to prohibit excessive recoveries."⁵² Instead of creating two competing and conflicting applications of the release rule, one under the Comparative Fault Act, and one under the common law, the supreme court chose instead to abrogate the release rule as to both comparative fault and common law actions.⁵³ The court stated:

44. *Bellew v. Byers*, 396 N.E.2d 335 (Ind. 1979); *Cooper*, 390 N.E.2d 155.

45. *Huffman*, 588 N.E.2d at 1266.

46. IND. CODE § 34-4-33-5 (1988).

47. *Huffman*, 588 N.E.2d at 1266.

48. *Id.*

49. *Id.*

50. *Id.* at 1267. The Comparative Fault Act does not apply to actions involving governmental entities (§8), products liability or warranty actions (§13), contract actions (§1(a), medical malpractice (§1(a)(1)), or actions for intentional injury (§2(a)). IND. CODE § 34-4-33 (1988 & Supp. 1992).

51. *Huffman*, 588 N.E.2d at 1267.

52. *Id.*

53. *Id.*

It would be illogical to hold that the rationales for the release rule have been destroyed but to continue to impose the release rule in some cases only because one of the defendants has been exempted from the Comparative Fault Act. To apply only two separate rules based on the legal status would serve to add further confusion to the orderly administration of justice in cases, as here, where some parties are covered by the Comparative Fault Act and others are not.⁵⁴

Accordingly, it is now the law of Indiana that a release will operate only as to those parties who are clearly intended to have the benefit of the agreement.⁵⁵

B. The Exception to Abrogation

Practitioners should be cautioned not to take too much comfort in abrogation of the release rule. It is not unusual for a release agreement to contain a provision stipulating that the entire claim for damages is to be released by the agreement. A standard release agreement will often contain language requiring the plaintiff to give up all rights and claims against all persons for damages.⁵⁶ Releases which contain either of these limiting provisions are enforceable and may be used to preclude actions against other joint tortfeasors who were not parties to the agreement.⁵⁷ A release agreement should therefore be carefully drafted to exclude claims against other third parties not signatories to the agreement and to reserve rights of action against other responsible persons, if that is the parties' intent.

C. Remaining Viability for the Release Rule?

Surprisingly, although *Huffman* should have been the last word on the release rule, it was not. After the supreme court's decision, the release rule was given a limited reincarnation by the Indiana Court of Appeals in *Chaiken v. Eldon Emmor & Co., Inc.*⁵⁸ In *Chaiken*, the court of

54. *Id.*

55. *Id.*

56. *See, e.g.,* Smith v. Hansen, 582 N.E.2d 446, 449 (Ind. Ct. App. 1991).

57. For example, prior to the *Huffman* decision, the Indiana Court of Appeals applied the release rule, stating "whether passage of the Comparative Fault Act has abolished the rule is a question for our supreme court to answer, not this one." *Smith*, 582 N.E.2d at 449. However, foreseeing the supreme court's pronouncement on this issue, the Indiana Court of Appeals was careful to base its enforcement of a release agreement as to other tortfeasors upon the alternative grounds that the document contained unambiguous language releasing "all persons" from any claims which the plaintiff might assert. *Id.* at 449.

58. 597 N.E.2d 337 (Ind. Ct. App. 1992).

appeals did not discuss *Huffman* in the body of its opinion; rather, the supreme court's decision was relegated to a footnote.⁵⁹ The Indiana Court of Appeals interpreted the new rule adopted in *Huffman* as operating prospectively, thereby making it inapplicable to this case.⁶⁰ The *Chaiken* pronouncement is troubling in view of the language in *Huffman* upon which it was based: "[f]rom this point forward, a release *shall be interpreted* as a contract releasing only those persons intended to be released."⁶¹ The Indiana Court of Appeals in *Chaiken* apparently construed the foregoing language as holding that the release rule continued to operate on agreements executed prior to the date of the *Huffman* decision. Yet, if this logic were carried completely through, the release at issue in *Huffman* should likewise not have been exempted from operation of the release rule.

The *Chaiken* interpretation of *Huffman* is also difficult given that the supreme court's primary rationale for rejecting the release rule was the adoption of the Comparative Fault Act.⁶² In other words, if the release rule remained effective as to *any* actions, such viability would be limited to only agreements releasing causes of action which arose prior to the effective date of the Comparative Fault Act.⁶³ In any event, no matter how inexplicable the rationale of *Chaiken*,⁶⁴ practitioners should perhaps not automatically disregard application of the release rule without first determining the agreement's date of execution.

IV. SET-OFF IN COMPARATIVE FAULT ACTIONS

Although *Huffman* was decided in the context of a common law action, the court extended its ruling to comparative fault cases as well. Thus, the court's reaffirmation of a trial court's duty to reduce jury verdicts by previously received settlement amounts⁶⁵ could arguably be construed as approving the application of set-off of amounts received in

59. *Id.* at 347 n.1.

60. *Id.*

61. *Huffman v. Monroe County Community Sch. Corp.*, 588 N.E.2d 1264, 1267-68 (Ind. 1992) (*emphasis added*).

62. *Id.* at 1266.

63. The Comparative Fault Act became effective Jan. 1, 1985. See Pub. L. 317-1983, § 2. The possibility of successfully prosecuting a negligence action arising prior to the effective date of the Comparative Fault Act is not merely academic in light of the recent decision on the discovery rule. See *supra* notes 1-15 and accompanying text.

64. The purpose of the *Chaiken* court's analysis and application of the release rule after *Huffman* is difficult to discern at best. However, the court was careful to further support its decision based upon a set-off of the amount received under the settlement agreement against the damages verdict rendered. *Chaiken*, 597 N.E.2d at 347.

65. *Huffman*, 588 N.E.2d at 1267 (citing *Manns v. State Dep't of Highways*, 541 N.E.2d 929 (Ind. 1989)).

settlement in comparative fault cases. However, in comparative fault cases, there is no rationale for reducing a jury verdict by the amount received by a plaintiff as consideration for a covenant not to sue, a covenant not to execute, or, in light of *Huffman*, a release of one of several tortfeasors. Settlements between an injured party and less than all potentially liable persons are common in multi-tortfeasor cases. The practical effects of settlements are thus of crucial importance to both claimants and defendants.⁶⁶ Accordingly, this section of the Article explores the inequities which can arise when set-off is applied in comparative fault cases where a settling tortfeasor remains in the action as a nonparty, and concludes that set-off is not appropriate in comparative fault cases.

A. *Application of Pro Tanto Discharge in Comparative Fault Cases*

The decision of the Indiana Supreme Court in *Bedwell v. De Bolt*⁶⁷ is generally cited as authority for the application of set-off, or pro tanto discharge, in cases involving joint tortfeasors. In *Bedwell*, the court explained the common law rule that all joint tortfeasors liable for injury may be fully discharged only by (1) an unqualified release of one of the tortfeasors, or (2) full satisfaction of a claim for damages by one of the tortfeasors, regardless of the character of the instrument, even if no release is executed.⁶⁸ Further, the court stated that, "under an answer of full satisfaction by a joint tortfeasor a defendant is entitled to a pro tanto credit for anything less than full payment which the plaintiff has received from that source."⁶⁹ This directive to reduce a plaintiff's damages by amounts received in settlement has been consistently and frequently applied in cases involving multiple tortfeasors.⁷⁰ Whether the funds re-

66. For a discussion of numerous issues arising in partial settlement in comparative fault cases, see generally Elizabeth M. Behnke, Note, *Partial Settlement of Multiple Tortfeasor Cases Under the Indiana Comparative Fault Act*, 22 IND. L. REV. 939 (1989).

67. 50 N.E.2d 875 (Ind. 1943).

68. *Id.* at 878-79.

69. *Id.* at 879.

70. See, e.g., *Manns v. State Dep't of Highways*, 541 N.E.2d 929, 933-34 (Ind. 1989) (partial or total satisfaction is determined by simply applying the amount received against the amount of the verdict rendered; verdict to be reduced pro tanto (meaning "for so much")); *Indiana State Highway Comm'n v. Morris*, 528 N.E.2d 468 (Ind. 1988); *Board of Comm'rs of Adams County v. Price*, 587 N.E.2d 1326 (Ind. Ct. App. 1992); *City of Hammond v. Rossi*, 540 N.E.2d 105 (Ind. Ct. App. 1989).

Each of these decisions discusses set-off in the context of an action involving a governmental entity as a defendant. While *Huffman* focused attention on the Comparative Fault Act, it too was decided in the context of a defending governmental entity. Surprisingly, no decisions have yet been rendered in a context which would force resolution of the issue of set-off under comparative fault, even though settlements under any type of agreement have been subject to set-off for several years.

ceived constitute a partial or total satisfaction is determined by applying the amount received against the amount of the verdict rendered.⁷¹

Under the Comparative Fault Act,⁷² a plaintiff is not required to file suit against all potentially liable tortfeasors. However, the Act directs the jury to assess the percentage of fault of the claimant, any defendant, and any "nonparty."⁷³ It has been noted that the nonparty most frequently encountered by juries is a tortfeasor who has settled with the claimant.⁷⁴ A defendant can and must affirmatively invoke the nonparty defense for purposes of an allocation of fault which includes a settling tortfeasor.⁷⁵ The Comparative Fault Act specifically prescribes the manner in which the jury is to perform its allocation function. First, the jury is to determine the percentage of fault of each party and any person who is a nonparty.⁷⁶ If the claimant's action is not barred,⁷⁷ the jury assesses the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.⁷⁸ The jury then enters a verdict against each defendant in an amount based on each defendant's percentage of fault as applied to the total damages.⁷⁹ The verdict form requires disclosure of only the percentage of fault charged against each party and nonparty and the amount of the verdict against each defendant.⁸⁰

71. *Manns v. State of Indiana Dep't of Highways*, 541 N.E.2d 929, 934 (Ind. 1989); *Sanders v. Cole Mun. Fin.*, 489 N.E.2d 117, 121 (Ind. Ct. App. 1986).

72. IND. CODE § 34-4-33-1 (1988 & Supp. 1992).

73. IND. CODE § 34-4-33-5(b)(1) (1988). A "nonparty" is defined as "a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant. A non-party shall not include the employer of the claimant." *Id.* § 34-4-33-2(a).

74. Leonard E. Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903, 908 (1984).

75. *Bowles v. Tatom*, 546 N.E.2d 1188, 1190 (Ind. 1989). *See also* IND. CODE § 34-4-33-10 (1988). The claimant is not required to join those persons as parties, but often will because, although the Act allows the jury to include the nonparty in the allocation of fault, it specifies that verdicts may be entered only against defendants. Further, under the holding of *Manns v. State of Indiana Dep't of Highways*, 541 N.E.2d 929 (Ind. 1989), a jury should not be informed of the settlement or of the amount of settlement. Thus, a jury presented with a nonparty defense in a comparative fault action may negatively wonder why plaintiff pursued only the party defendant and not both. This negative effect upon the jury can have a significant and prejudicial impact upon the plaintiff's case which would not occur in cases exempt from the Comparative Fault Act where the nonparty defense is unavailable.

76. IND. CODE § 34-4-33-5(b)(1) (1988).

77. In a comparative fault action brought against two or more defendants, a claimant is barred from recovery only "if his contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages." *Id.* § 34-4-33-4(b).

78. *Id.* § 34-4-33-5(b)(3).

79. *Id.* § 34-4-33-5(b)(4).

80. *Id.* § 34-4-33-6. Although the statutory scheme of the Act may require several

If set-off is applied in a case subject to the Comparative Fault Act where non-settling defendants have invoked the nonparty defense — and especially the general rule that the set-off is applied against the jury “verdict” — two interrelated problems occur. First, the claimant faces a significant risk of being precluded from full compensation. Second, partial settlements are significantly discouraged. For example, consider a case where A was injured through concurrent negligent acts of B, C, and D. A files suit against B, C, and D. A then settles with B for \$25,000. When A moves to dismiss B from the action, the remaining defendants assert the nonparty defense. At the end of trial, the jury determines the fault of each party and nonparty as follows: A - 40%; B - 30%; C - 20%; and D - 10%. Because A’s percentage of fault has not barred recovery, the jury can continue its deliberations. If the jury assesses the full injury to A to be in the amount of \$100,000, A will be fully compensated through recovery in the amount of \$60,000.⁸¹ For convenience, this discussion will refer to this amount as A’s “adjusted damages.” The verdict form discloses the assessed percentages of fault of the parties and of nonparty B, and a verdict is entered against C in the amount of \$20,000 and against D in the amount of \$10,000, for a total amount recoverable by judgment in the amount of \$30,000.

If the general rules of set-off are applied, the jury “verdict” may be reduced by the amount A received in settlement. The verdicts total \$30,000; a set-off of \$25,000 would result in a judgment in favor of A in the amount of only \$5,000. A’s total recovery in the case, through judgment and settlement, is thereby diminished to \$30,000, one-half of the amount required to fully compensate A under a comparative fault scheme. Clearly this is an inequitable result and a severe disincentive to partial settlements. This result occurs because the amount A is able to recover through judgment under the Comparative Fault Act has already been diminished by an amount based on both A’s and the settling nonparty’s percentage of fault. Accordingly, our appellate courts must clarify that set-off is inappropriate in cases subject to comparative fault, or demonstrate how set-off can be equitably incorporated without diminishing the incentive of parties to enter into partial settlements.

Few options exist for an equitable use of set-off in comparative fault cases. One imperfect alternative would be to require the non-settling

verdict forms to be given to the jury, courts should not characterize them as “special verdicts or interrogatories,” but as “general verdicts”; and thus such verdicts may not be used to impeach a general verdict that appears inconsistent. *State of Indiana Highway Dep’t v. Snyder*, 594 N.E.2d 783 (Ind. 1992).

81. Under the Act, “any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant’s contributory fault” IND. CODE § 34-4-33-3 (1988).

defendants to elect between a set-off or the nonparty defense. If the remaining defendants elect the nonparty defense rather than set-off, a plaintiff has the potential to receive greater than full compensation only in those few cases where the claimant has settled for an amount greater than that portion of damages allocated to the nonparty. However, trials utilizing the nonparty defense are more expensive and lengthy than trials not involving the nonparty defense. If defendants are required to elect between set-off and the nonparty defense, many nonparty trials would be eliminated. Thus, the potential for windfall to the plaintiff is arguably counterbalanced by furthering the interests of judicial economy. Nonetheless, implementation of this method arguably would be appropriate only for the legislature.

Within the province of the judiciary, one option would be to adopt a system which applies set-off against the claimant's adjusted damages, rather than against the jury verdict. In A's case, although the verdict form would not require disclosure of this value, it could readily be calculated that the jury determined that A was entitled to compensation in the amount of \$60,000. If set-off of the \$25,000 received by A in settlement from B is applied against A's adjusted damages of \$60,000, A would then be entitled to a recovery in the amount of \$35,000. Two options then exist. First, the court could enter a verdict against C and D based on the application of the percentage of fault figures determined by the jury to the \$35,000; i.e., 20% of \$35,000 (\$7,000) and 10% of \$35,000 (\$3,500), respectively. However, the resulting verdicts totalling \$10,500, combined with the \$25,000 received in settlement, still significantly undercompensate A for his adjusted damages valued at \$60,000. This system would therefore fail to resolve the inequities to a claimant in comparative fault cases if set-off is permitted.

Alternatively, the court could require the verdict amounts to total \$35,000. That is, the total amount of \$35,000 could be recovered from the nonsettling defendants via verdicts against C and D in amounts based on their assessed percentages of fault; i.e., a verdict against C in the amount of \$23,333.33, and against D in the amount of \$11,666.67.⁸² However, this option seems at odds with the scheme of the Comparative Fault Act. Indiana's Act, in essence, reduces a claimant's recovery by an amount based on the percentage of fault of the settling nonparty applied to the claimant's total damages; and verdicts against parties are specifically directed to be in an amount based on the party's percentage of fault as applied to the claimant's total damages.⁸³ Thus, nonsettling

82. These amounts are based on the following calculations: C's liability = $(2/3 \times \$35,000)$; D's liability = $(1/3 \times \$35,000)$.

83. "The cornerstone principle of a comparative fault system is that each person

tortfeasors would vigorously oppose any incorporation of set-off that could increase their liability above that amount, which would occur in situations where the settlement received by a claimant is less than the settling-nonparty's comparative liability would have been.

A more feasible judicial solution would be to apply a set-off only when the amount received in settlement is greater than the settling—nonparty's comparative liability would have been.⁸⁴ In A's case, B's liability as assessed by the jury would have been \$30,000. Under this proposed solution, because the settlement amount of \$25,000 was less than that amount, no set-off would occur. If, however, A and B had settled for \$35,000, a set-off in the amount of \$5,000 could be applied. The set-off would benefit the non-settling defendants by reducing the verdicts against them proportionately, yet would still allow the claimant to be fully compensated. Of course this also represents a deviation from a strict application of the comparative fault procedures, but it is arguably a more equitable incorporation of set-off.

Notably, however, even this application of set-off does not realistically alleviate the significant discouragement from settlement caused by concurrent use of both the nonparty defense and set-off.⁸⁵ All settlements are, at best, an educated guess based upon each attorney's experience, available evidence, and intuition. Under this proposed use of set-off, if settlement can be reached with B, but not with recalcitrant C or D, the plaintiff must suffer the risk that a jury will assess more fault to B than A predicted. If this occurs, the plaintiff has no ability to recover the full amount of compensation to which the jury determined that A was entitled, and A must absorb the full extent of his poor bargain. On the other hand, if the plaintiff successfully defends or diminishes the percentage of fault allocated to the nonparty, the settlement amounts in excess of the apportioned nonparty damages may be applied as a set-off to the remaining defendant's liability. While this would not result in an actual penalty, it would deny the plaintiff the full benefit of his previous settlement.

Even with this very restricted use of set-off, the plaintiff bears a very significant risk in partial settlement which is not offset by any

who contributes to cause an injury must bear the burden of reparation for that injury in exact proportion to his share of the total fault which contributed to cause the injury." Eilbacher, *supra* note 74, at 903.

84. That is, a set-off would apply only when it is greater than the product of the multiplication of the settling-nonparty's percentage of fault times the total amount of the claimant's damages.

85. *Charles v. Giant Eagle Mkts.*, 522 A.2d 1, 3 (Pa. 1987) ("[I]t would be a disservice to a supportive settlement policy to provide a windfall to a non-settling tortfeasor where the settlement process proves to be more generous than the subsequent verdict.").

corresponding potential gain, even while having been put through the expense of trial as to all parties, including those nonparties with whom settlement had been previously reached. The plaintiff's attorney is placed in the uncomfortable position of having to perfectly predict how the jury will apportion fault to the settling party in order to arrive at an appropriate settlement amount. As in the tale of Goldilocks, the plaintiff attorney's foresight must be "just right." Yet the potential for getting it "just right" is incredibly unlikely in multi-party litigation. Plaintiffs' attorneys would require a crystal ball — not normally part of the practitioner's tools — to successfully evaluate partial settlement in complex litigation.

Thus, the most equitable solution may be for our courts to pronounce that set-off is not applicable to cases subject to the Comparative Fault Act, or, put another way, that comparative fault cases represent an exception to the general rules of pro tanto reduction of amounts received in settlements. Absent application of pro tanto discharge, a plaintiff still risks a penalty depending on the accuracy of the plaintiff's prediction in the settlement process, but this risk is offset by the potential for gain if his estimate is better than the settling tortfeasor's. This windfall/penalty settlement rule would satisfy goals of fairness within a comparative fault scheme without adding further disincentives to the settlement process.⁸⁶ Further, such a judicial interpretation could be readily justified by either (1) a finding that joint and several liability was abrogated, or at least significantly modified by enactment of the Comparative Fault Act, or (2) a policy determination that the use of partial settlements may otherwise be seriously threatened.

B. The Rationale for an Exception to Set-Off in Comparative Fault Cases

The common law rules requiring pro tanto reduction of a plaintiff's claim evolved from the related historical concepts of joint tortfeasors and joint and several liability. Historically, joint tortfeasors were viewed as a single entity, whereby the act of one equaled the act of all; and thus there could exist but one cause of action.⁸⁷ Joint and several liability is the distinct common law principle that one joint tortfeasor could be held liable for the entire loss sustained by the plaintiff because a defendant is liable for all consequences proximately caused by that defendant's wrongful act.⁸⁸

86. Eilbacher, *supra* note 74, at 910-11.

87. See generally W. PAGE KEETON ET. AL, PROSSER AND KEETON ON THE LAW OF TORTS § 51, at 346 (5th ed. 1984).

88. *Id.* § 47, at 328.

The relation between the common law concepts of joint tortfeasors, joint and several liability, and set-off was recently emphasized by the court of appeals. In *Sanders v. Cole Municipal Finance*,⁸⁹ Albert Sanders and his wife brought suit against multiple defendants for damages sustained by Sanders through the course of his employment. Prior to trial, the Sanders settled with all defendants except Cole Municipal Finance. The settlement agreements were in the form of covenants not to sue or execute and a loan receipt agreement, all of which unquestionably reserved the plaintiffs' rights against Cole Municipal Finance. The jury returned a verdict against Cole Municipal Finance in the amount of \$320,000. On the defendant's motion for pro tanto discharge, the trial court reduced the verdict by the amounts received in settlement. Because the settlement amounts exceeded the amount of the jury verdict, the court entered an order of judgment in favor of the defendant. Sanders appealed, in part asserting that, by granting the discharge, the trial court failed to give effect to the express terms of the covenants not to sue or execute which were intended to be only partial satisfaction.⁹⁰

The court of appeals' rationale for rejecting that contention hinged on the concept of joint and several liability:

If the agreement is a covenant not to sue and the co-defendants are jointly and severally liable, the funds received by the plaintiff for a covenant not to sue with any defendant must be credited pro-tanto against any judgment against any co-defendant. The principle behind this credit is that the injured party is entitled to only one satisfaction for a single injury and the payment by one joint tortfeasor inures to the benefit of all.⁹¹

The plaintiffs also argued that the pro tanto discharge was in error because the funds were received in settlement of independent rather than joint acts of negligence. This argument was premised on the fact that the co-defendants were not in fact "joint tortfeasors" as that concept originated.⁹² The court again rejected the argument because joint and

89. 489 N.E.2d 117 (Ind. Ct. App. 1986).

90. *Id.* at 119-20.

91. *Id.* at 120 (citing *Bedwell v. DeBolt*, 50 N.E.2d 875 (Ind. 1943); *see also* *Scott v. Krueger*, 280 N.E.2d 336 (Ind. Ct. App. 1972), *trans. denied*; *Parry Mfg. Co. v. Crull*, 101 N.E. 756 (Ind. Ct. App. 1913), *trans. denied* (1914)). The court further stated that, although funds received from covenants not to sue are set-off, funds received under a loan receipt agreement are treated differently. *Id.*

92. The original meaning of "joint tort" applied only to cases involving a common purpose or where there was mutual aid in carrying out the purpose, not where the acts were independent. KEETON ET. AL, *supra* note 87, § 46, at 322-25.

several liability applies even where each co-defendant acts separately and independently.⁹³

As noted, the directive to reduce a plaintiff's damages by amounts received in settlement has been consistently and frequently applied in cases involving multiple tortfeasors.⁹⁴ Significantly, none of the reported decisions have been decided under the Comparative Fault Act.⁹⁵ Because the concept of pro tanto credit is premised on the concept of joint and several liability, applying set-off in cases exempt from the Act does not raise immediate difficulties. However, most commentators suggest that joint and several liability was abrogated, or at least significantly modified, by enactment of the Comparative Fault Act. If so, an exception to the rules of pro tanto credit in comparative fault cases is justified.

The supreme court concluded in *Huffman* that the release rule should no longer apply in comparative fault cases.⁹⁶ The court's conclusion was based, in large part, on the fact that the "metaphysical common law concept of viewing all joint tortfeasors as a single entity has been superseded by the Act"⁹⁷ Yet, this statement does not necessitate the conclusion that the distinct concept of joint and several liability has been abrogated. Notably, the supreme court has expressly stated that whether joint and several liability was abrogated by the Comparative Fault Act is an unresolved issue that has not been addressed by the court.⁹⁸

93. *Sanders*, 489 N.E.2d at 121. The court in *Sanders* did not address the unfairness of the rules to the settling codefendants, but merely stated that because there is no right to contribution, the settling defendants had no legal right to complain. *Id.* at 121.

94. *See, e.g., Manns v. State Dep't of Highways*, 541 N.E.2d 929, 933-34 (Ind. 1989) (partial or total satisfaction is determined by simply applying the amount received against the amount of the verdict rendered; verdict to be reduced pro tanto (meaning "for so much")); *Indiana State Highway Comm'n v. Morris*, 528 N.E.2d 468 (Ind. 1988); *Board of Comm'rs v. Price*, 587 N.E.2d 1326 (Ind. Ct. App. 1992); *City of Hammond v. Rossi*, 540 N.E.2d 105 (Ind. Ct. App. 1989).

95. Interestingly, the settling co-defendant in reported cases is generally the party which would have been subject to the Act; and the non-settling defendant is generally a governmental entity, which is exempt from the Comparative Fault Act. *See* IND. CODE § 34-4-33-8 (1988).

96. *Huffman v. Monroe County Community Sch. Corp.*, 588 N.E.2d 1264, 1266 (Ind. 1992).

97. *Id.*

98. *Bowles v. Tatom*, 546 N.E.2d 1188, 1190 n.1 (Ind. 1989). Interestingly, this pronouncement came shortly after the United States District Court for the Southern District of Indiana determined that the Indiana Supreme Court would abandon the traditional release rule in light of the Act. *See Gray v. Chacon*, 684 F. Supp. 1481 (S.D. Ind. 1988) (Barker, J.). In *Gray*, Judge Barker also stated that the Comparative Fault Act abrogated joint and several liability, and specifically noted that academic arguments in favor of retention of joint and several liability lack "persuasive force and [are] at odds with the legislative motivation otherwise evidenced throughout the Act." *Id.* at 1495 n.6.

Whether joint and several liability has survived has been the subject of much scholarly debate.⁹⁹ The Comparative Fault Act, by precluding recovery only if a plaintiff's fault is assessed at greater than 50 percent, even in multi-party cases, modified the harshness of the common law rule that held a plaintiff's contributory negligence could totally bar recovery from other negligent actors. It has been noted that the trade-off for this benefit to the plaintiff was, in part, a partial abrogation of the joint and several liability rule.¹⁰⁰ On the other hand, the assertion that the Comparative Fault Act abrogated joint and several liability is largely premised on a "necessary implication" argument.¹⁰¹ That is, the Act and its legislative history do not expressly abrogate joint and several liability. Rather, the premise must rest on the jury instructions which direct "a verdict against each defendant" based on the assessment of each defendant's allocation of fault.¹⁰² Moreover, numerous arguments can be advanced in support of an interpretation that the Comparative Fault Act affects only the plaintiff's right to recovery of damages—not the defendant's liability—and thus retains joint and several liability.¹⁰³ Indeed, the Act is internally consistent only under the interpretation that joint and several liability is retained in modified form.¹⁰⁴

It is beyond the scope of this discussion to resolve the extent to which joint and several liability may remain viable in light of the Comparative Fault Act. Rather, the primary point of this discussion is that pro tanto reduction of a non-settling defendant's liability is inequitable in comparative fault cases. However, the most logical reasoning in support of a judicial exception to the general rules of pro tanto discharge is that joint and several liability has been abrogated or at least significantly

99. See Lawrence P. Wilkins, *The Indiana Comparative Fault Act at First (Lingering) Glance*, 17 IND. L. REV. 687 (1984).

100. See Edgar W. Bayliff, *Drafting and Legislative History of the Comparative Fault Act*, 17 IND. L. REV. 863, 867 (1984). The abrogation is arguably only partial because there is no legislative indication of an intention to abolish joint and several liability for defendants who can be treated as a single party as defined in section 2(b) of the Act, or from application in cases in which claims under the Act are joined with claims not covered by the Act. *Id.* at 867-68.

101. See Wilkins, *supra* note 98, at 687, 703-05.

102. Wilkins, *supra* note 98, at 687, 703-05. See IND. CODE § 34-4-33-5(b)(4) (1988).

103. Wilkins, *supra* note 98, at 705-18. The arguments include: (1) the Act's substantive sections do not expressly abrogate joint and several liability as many comparable state statutes do; (2) the requirement of "a verdict" is ambiguous and does not compel seriatim verdicts; (3) even if separate verdicts are rendered, a judgment against two or more defendants is considered joint and several for purposes of permitting enforcement proceedings jointly or separately under procedural trial rules; (4) the Act's distinction between defendants who "may be treated along with another as a single party" under section 2(b); and (5) abrogation of joint and several liability results in a disproportionate benefit to tortfeasors. *Id.*

104. See *infra* note 104.

modified by the Comparative Fault Act.¹⁰⁵ The rule directing a trial court to reduce a verdict against a co-defendant by amounts received in settlement with other co-defendants evolved in order to preclude a plaintiff from recovering more than a single satisfaction of a judgment. Pro tanto discharge was necessary because a plaintiff could obtain and execute a judgment for all damages against any defendant under the doctrines of joint tortfeasors and joint and several liability. Under the Comparative Fault Act, the verdict rendered against any defendant is restricted to an amount based on the jury's allocation of fault to that defendant. If joint and several liability is deemed to be vitiated, then a comparative fault

105. Notably, the express language of the Comparative Fault Act suggests that the Indiana General Assembly contemplated that joint and several liability would continue to operate in some form in comparative fault cases. The Act denies contribution amongst tortfeasors in comparative fault cases. See IND. CODE § 34-4-33-7 (1988). Yet this statutory provision merely continues the general common law rule denying contribution amongst jointly and severally liable tortfeasors. See *Sanders v. Cole Mun. Fin.*, 489 N.E.2d 117, 121 (Ind. Ct. App. 1986). Thus there was no need to legislatively deny contribution if the Act abrogated joint and several liability.

Rather, the express legislative provision suggests that joint and several liability survives in modified form, and that the General Assembly intended to preclude a jointly and severally liable *comparative fault* defendant, against whom the plaintiff executed an entire judgment, from using the allocation of fault as a basis for contribution. Importantly, the retention of joint and several liability must be in *modified* form because the traditional concept would render the nonparty defense meaningless.

If joint and several liability has survived in modified form, our courts have the option of defining the new contours for the doctrine in light of the Act. Most significantly, the doctrine should be modified so as to maintain its compensatory function to the plaintiff, while at the same time encouraging partial settlements. These dual purposes can be attained by interpreting the Act as retaining joint and several liability as to parties to the action, but abrogating its application to nonparties.

This interpretation would encourage settlement by assuring settling tortfeasors that they cannot be held responsible for liability apportioned to defendants who refuse to settle. Further, while it would continue to encourage plaintiffs to name all potentially liable tortfeasors as parties unless they have settled, this interpretation would lessen the plaintiff's burden of collecting from multiple parties.

Moreover, retaining joint and several liability as to parties to the action would achieve perhaps the only rational internal reconciliation of the Act in its most current version. That is, this interpretation gives meaning to the prohibition on contribution, as well as to the nonparty defense.

Under this interpretation, plaintiffs will need to make extra effort to discover all potential defendants prior to expiration of relevant statutes of limitation, and also to get a complaint on file as to each known defendant prior to 150 days before expiration of the relevant statute of limitation. This would force the named defendants to name any potential nonparties at least 45 days prior to the expiration of the statute of limitations. See IND. CODE § 34-4-33-10 (1988). Failure to take this action could result in the potential naming of a nonparty after the expiration of the statute of limitations. Under the proposed interpretation, this would then be the only possible way in which a plaintiff could be denied her full measure of damages attributed to multiple tortfeasors.

defendant cannot be held liable for any amount of damages beyond that specified in the verdict rendered against that defendant. Further, a plaintiff could recover greater than full satisfaction only in those few cases where the amount received in settlement turns out to be greater than the amount of damages apportioned to the settling defendant, i.e., where the claimant has made a good settlement bargain. Set-off thus becomes an unnecessary judicial device.

Additionally, even if joint and several liability has survived in some form, strong policy arguments dictate against any application of set-off in comparative fault cases. Most notably, there is a strong judicial policy in this state to encourage partial settlements.¹⁰⁶ Contrary to this policy, any use of pro tanto discharge discourages settlements; even the most equitable use of set-off will compel a claimant to absorb the risk of a poor settlement bargain without the potential for any gain when a good bargain is made. This is unjustifiable because, in its most practical terms, a settlement can be viewed as a mutual contract of insurance. The plaintiff compromises his claim for less than the best potential jury award in return for insurance against the worst possible verdict. The settling party pays more in settlement than the lowest possible verdict in return for insurance against the highest possible verdict. If settlement agreements with nonparties are allowed to be set-off, then the plaintiff has no significant incentive to enter into partial settlements because any excess settlement amount over the liability assessed to the settling nonparty will simply enure to the benefit of the remaining party defendants who rightfully or wrongfully refused to settle.¹⁰⁷ In fact, where a plaintiff has received a significant settlement from one of the tortfeasors, there will be a very powerful incentive for the remaining party defendants not to make reasonable offers in settlement based upon the "right" of set-off. Thus, to promote the attainment of partial settlements, the judiciary should create an exception to pro tanto discharge rules in comparative fault cases.

106. *Manns v. State of Indiana Dep't of Highways*, 541 N.E.2d 929, 932 (Ind. 1989) (the judicial policy of this state strongly favors the use of partial settlements).

107. Ultimately, a settlement is simply the sale of a cause of action for an agreed price. In effect, set-off in a comparative fault action allows for adjustment after the sale, and irrationally gives the benefit to a third wrongdoer, not even a party to the original transaction. Just as in any business deal, a plaintiff should be able to "sell" his cause of action for the best price he can get and not be exposed to penalty for selling too low without being allowed the incentive to retain the benefit of selling high. Applying the same principles to the futures commodity market would result in the ridiculous situation of requiring the futures soybean buyer to pay to seller any additional amount by which the price of soybeans went up from the date of contract to the date of delivery, while at the same time if the price goes down, the seller is not required to make any refund of the original contract price to the buyer. Our capitalist economy would grind to a shuddering halt.

Furthermore, a strong policy underlying the Comparative Fault Act is the expansion, and refinement, of the compensatory function of tort law. The primary purpose of set-off is to preclude a windfall to the plaintiff—with no corresponding assurance of full compensation. Yet the Act's directive to allocate fault among parties and nonparties and to enter a verdict against each defendant based on that defendant's percentage of fault, effectively circumscribes the claimant's ability to obtain greater than full satisfaction. A more appropriate refinement of the compensatory function of tort law is achieved by exempting comparative fault actions from the general rule requiring a set-off of amounts received in settlement. This proposition is supported by Judge Sarah Evans Barker's statement in *Gray v. Chacon*, that, under the Comparative Fault Act, "each defendant has liability to the plaintiff that can be neither increased nor decreased by the relative amount of some other defendant's payment to the plaintiff."¹⁰⁸

In sum, set-off serves no rational purpose in comparative fault cases. The plaintiff is no longer settling with a party who is legally responsible to pay the entire damages; rather, the plaintiff is settling with a party that is legally responsible only for that portion attributable to the settling party's culpability. An application of set-off in a comparative fault action could not be based upon any real possibility of unjust enrichment to the plaintiff and should not be allowed in any form. This situation needs to be clarified with direction from the court of appeals as to whether set-off is to be applied in comparative fault cases where a settling party is subject to being subsequently named as a nonparty defendant. The alternative is to leave a scheme in place which could effectively discourage partial settlements in multi-party comparative fault litigation.

V. THE IMPACT RULE

During this survey, the court of appeals further explored the dimensions of the impact rule as recently modified by the Indiana Supreme Court. Although exceptions have been carved out through the years, the impact rule has been a mainstay of the rules regarding recovery for infliction of emotional distress in Indiana tort law for nearly one hundred years.¹⁰⁹ Following the majority of jurisdictions throughout the nation, the rule in Indiana has been dramatically circumscribed during the last two years. Traditionally viewed, the impact rule permits recovery of damages for mental distress or emotional trauma "when the distress is accompanied by *and* results from a physical injury caused by an impact

108. 684 F. Supp. 1481, 1485 (S.D. Ind. 1988).

109. See, e.g., *Kalen v. Terre Haute & I.R.R. Co.*, 47 N.E. 694 (Ind. Ct. App. 1897).

to the person seeking recovery.”¹¹⁰ This translates to three elements: (1) an impact on the plaintiff, (2) which causes physical injury, and (3) which physical injury causes the emotional distress.¹¹¹

The recent evolution of the impact rule began with the supreme court's decision in *Cullison v. Medley*.¹¹² As detailed in last year's tort survey,¹¹³ the Indiana Supreme Court in *Cullison*¹¹⁴ determined that the rationale for the impact rule was no longer valid.¹¹⁵ Its holding was narrow though. The court held that the rule will no longer bar recovery for emotional distress when sustained in the course of a tortious trespass.¹¹⁶ The *Cullison* decision also led the supreme court to recognize for the first time the tort of intentional infliction of emotional distress, which occurs when one “by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another.”¹¹⁷

The impact rule's application in an action for negligent infliction of emotional distress was considerably modified but not abrogated in *Shuam-*

110. *Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind. 1991) (citing *New York, Chicago & St. Louis R.R. Co. v. Henderson*, 146 N.E.2d 531, 543 (Ind. 1957); *Boston v. Chesapeake & O. Ry.*, 61 N.E.2d 326 (Ind. 1945); *Indianapolis St. Ry. v. Ray*, 78 N.E. 978, 980 (Ind. 1906)).

111. *Id.* at 454.

112. 570 N.E.2d 27 (Ind. 1991).

113. Jay Tidmarsh, *Tort Law: The Languages of Duty*, 25 IND. L. REV. 1418, 1449-56 (1992).

114. The court in *Cullison* addressed whether the “impact rule” prohibited *Cullison* from recovering under any of several legal theories for emotional distress which resulted from the Medleys' wrongful conduct. *Cullison* had invited the Medleys' 16 year old daughter to his house for a coke. The 16 year old arrived at his home late that evening. *Cullison* invited her in and went to put some clothes on. When he returned to the living room her father, her mother and her brother-in-law were sitting in the still dark living room. The father had a gun and the Medleys threatened *Cullison*. As a result, *Cullison* sought psychological counseling and therapy for approximately 18 months.

115. The court explained that the mere fact of physical injury does not make mental distress damages less speculative or subject to exaggeration or fictitious claims. *Cullison*, 570 N.E.2d at 30. Further, the court stated that juries are as qualified to judge someone's emotional distress as one's pain or suffering. *Id.*

116. *Id.* at 30. However, recovery depends on whether the intentional invasion provokes a reasonably foreseeable emotional disturbance or trauma. *Id.*

117. *Id.* at 31 (quoting RESTATEMENT (SECOND) OF TORTS § 46 (1965)). The court held that recovery under the tort would be allowed in Indiana under proper circumstances. *Id.* The facts in *Cullison* did not rise to that level, however. The court noted that a jury could not reasonably infer that Medley intended to inflict emotional injury based on the sole allegation that the Medleys knew that *Cullison* disliked guns. *Id.* Thus, under the court's holdings, *Cullison* was permitted to proceed to the jury on the question whether his emotional distress was a reasonably foreseeable result of the Medleys' intentional trespass, but could not seek recovery under the distinct tort of intentional infliction of emotional distress.

ber v. Henderson.¹¹⁸ In *Shuamber*, the defendant's car collided with the car driven by Gail Shuamber and caused physical injuries to the plaintiffs. Gail's son, a passenger in the vehicle, was killed. The Shuambers did not seek recovery for emotional trauma rising out of or caused by their own physical injuries; rather, their claim was based on the emotional trauma imposed on them as a result of observing a member of their immediate family sustain mortal injuries in the collision. The court found that the case did not fit within the exception to the impact rule recognized in cases where the defendant's conduct was "inspired by fraud, malice or like motives involving intentional conduct."¹¹⁹ More notably, the court stated that the Shuambers had not alleged "any intentional tort which would bring them within the recently announced rule in *Cullison v. Medley*."¹²⁰ The court thus broadened the *Cullison* holding by construing it to apply to any intentional tort, not just intentional trespass.¹²¹

The court then restated its rejection of the rationale for the impact rule,¹²² as it had done in *Cullison*, and held that, under appropriate circumstances, recovery for emotional distress should be allowed where the distress is the result of a physical injury negligently inflicted on a third person.¹²³ However, the court expressly declined to totally abolish Indiana's impact rule. The court stated:

When, as here, a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, we hold that such a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff.¹²⁴

118. 579 N.E.2d 452 (Ind. 1991).

119. *Id.* at 454 (citing *Naughle v. Feeney-Hornak Shadeland Mortuary, Inc.*, 498 N.E.2d 1298, 1301 (Ind. Ct. App. 1986); *Montgomery v. Crum*, 161 N.E. 251, 260 (Ind. 1928) (intentional abduction of a child); *Kline v. Kline*, 64 N.E. 9 (Ind. 1902) (attempted arson); *Lazarus Dep't Store v. Sutherlon*, 544 N.E.2d 513, 526 (Ind. Ct. App. 1989) (false imprisonment, malicious prosecution and defamation)).

120. *Id.* at 455.

121. In the court's words, "where intentional torts are concerned, recovery is now permitted in the absence of any physical injury if the tort is one which would foreseeably provoke an emotional disturbance of the kind normally to be aroused in the mind of a reasonable person." *Id.* at 455. See also *Smith v. Methodist Hosp. of Indiana*, 569 N.E.2d 743 (Ind. Ct. App. 1991).

122. *Shuamber*, 579 N.E.2d at 455 (quoting *Cullison*, 570 N.E.2d at 30).

123. *Id.*

124. *Id.* at 456.

Thus, only the third element of the impact rule, which requires that the physical injury caused by the impact be the cause of the emotional distress, was expressly abrogated in the case. It is now sufficient if the emotional trauma is the result of being "directly involved" in an impact.¹²⁵ Yet, the court's language suggests that the second element was abolished as well, and that it is sufficient if a claimant sustains any "direct impact" regardless of whether "physical injury" results.¹²⁶

During this survey period, the court of appeals had the opportunity to apply the supreme court's pronouncements regarding the impact rule. *Comfax Corp. v. North American Van Lines, Inc.*¹²⁷ involved a claim for intentional infliction of emotional distress. North American Van Lines (NAVL) agreed to purchase computer software accounting packages from Comfax, including two packages which Comfax agreed to custom design for NAVL. Comfax envisioned that the programs would remain Comfax property and that, for two years, NAVL would inform its agents of Comfax's products and would allow Comfax to contact the agents and advertise the products. NAVL realized the potential for profits and decided to attain the financial opportunity for itself. The comprehensive referral system Comfax envisioned never materialized, NAVL terminated the contract and one of Comfax's key programmers left Comfax and began to work for NAVL. NAVL then filed suit against Comfax and its president, James Kuker, for breach of contract and to prevent disclosure of, and to recover from Comfax, NAVL information or documents. Subsequently, Comfax went into financial collapse and ceased doing business. James Kuker attempted suicide, was hospitalized, and underwent an extensive rehabilitation program.

Kuker's counterclaims included an action for intentional infliction of emotional distress. The court held that, even if NAVL's conduct in terminating the contract could be characterized as extreme and outrageous, the facts did not demonstrate that NAVL intentionally or recklessly caused Kuker's emotional problem.¹²⁸ Although the court did not specify the facts leading to that conclusion, the conclusion is sound because the case indicates that NAVL's intent was to seize the financial opportunity for

125. Specifically, the court stated that the jury will need to determine that Gail's emotional trauma was the result of "being involved in the accident," as opposed to being merely the normal emotional distress experienced by a mother who has tragically lost her son. *Id.* at 456.

126. In applying this rule to the facts, the court found that both Gail Shuamber and her daughter sustained a sufficient impact because they were "directly involved" in the accident. The court did not bring into the analysis the fact that they suffered physical injury. *Id.*

127. 587 N.E.2d 118 (Ind. Ct. App. 1992).

128. *Id.* at 127.

itself despite any representations to Comfax—not to cause Kuker’s emotional distress. The court then held that Kuker’s claim would fail on a motion for summary judgment, even if brought under the theory of negligent infliction of emotional distress. The court’s conclusion was primarily based on its reasonable, but nonetheless harsh, determination that economic loss is not sufficiently serious in nature, and the resulting emotional trauma is not of a kind and extent normally expected to occur in a reasonable person.¹²⁹

However, the court also analyzed the requirement of physical injury or impact in light of *Shuamber*. The court’s analysis on this point is more questionable. Kuker alleged that NAVL caused him to suffer mental and emotional breakdown and to eventually slit his wrists.¹³⁰ The court held that this was an insufficient direct impact because “the accompanying physical impact must occur prior to or simultaneously with the infliction of emotional distress.”¹³¹ The troublesome nature of this statement is twofold. First, the language in *Shuamber* does not require a “physical” impact. In *Shuamber*, the court’s analysis of whether the plaintiffs sustained a sufficient “impact” did not include the fact that the plaintiffs had suffered physical injuries;¹³² rather, the *Shuamber* analysis focused on the fact that the plaintiffs were in the car which the defendant collided with, and were thus “directly involved” in the defendant’s conduct.¹³³

Second, *Shuamber* did not hold that the emotional distress must occur contemporaneously with the direct impact; rather, it held that emotional distress must merely be “by virtue of [the claimant’s] direct involvement” with the defendant’s negligent conduct.¹³⁴ Because the supreme court intentionally used this broad language, it is troubling that *Shuamber* would be construed to preclude a situation where an individual has experienced a potentially fatal physical injury by virtue of his involvement with a defendant’s negligent course of conduct merely because of the timing of that impact. The court of appeals’ reasoning, however, stemmed from its great reluctance to expand the torts of both intentional and negligent infliction of emotional distress beyond what it perceived to be the “narrow class of cases in which these torts may offer relief.”¹³⁵

129. “We recognize that an economic loss may cause emotional distress, but cannot compare the loss of a loved one with the loss of an investment, and will not extend *Shuamber*’s holding as *Kuker* suggests.” *Id.*

130. *Id.* at 127 n.11.

131. *Id.*

132. *Shuamber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991).

133. *Id.*

134. *Id.*

135. *Comfax Corp. v. North American Van Lines, Inc.*, 587 N.E.2d 118, 128 (Ind. Ct. App. 1992).

The court of appeals also applied the modified impact rule in *Adams v. Clean Air Systems, Inc.*¹³⁶ In *Adams*, the plaintiffs acquired salvage rights to an abandoned hospital from Clean Air Systems (CAS). The owners of the hospital had hired CAS to remove asbestos from the building. Although CAS allegedly removed the asbestos before the plaintiffs began salvaging materials, the plaintiffs discovered a powdery substance while working without breathing equipment. The plaintiffs sought recovery for negligent infliction of emotional distress based on their constant fear that they may develop a fatal asbestos-related malady. The court determined that, although the plaintiffs earnestly argued that they suffered emotional distress due to the possibility of exposure to asbestos, "some certainty that plaintiffs actually inhaled the potentially harmful toxin is required" to maintain the cause of action.¹³⁷

The court properly applied *Shuamber* by requiring some type of direct impact for recovery. However, the court made a confusing statement about the need for a causal link. The court said:

It does not appear that the mere possibility that an individual has inhaled or ingested a toxin, which may or may not produce physical injury, *which in turn causes emotional distress to that individual*, states a cause of action under the exception announced in *Shuamber*.¹³⁸

Because *Shuamber* abrogated the need for such causal link, this statement should be read as affirming that emotional trauma must be "by virtue of [the] direct involvement." The court also declined to create an exception to the impact rule where a defendant acts with gross indifference to the welfare of others.¹³⁹

Lastly, in *Mehling v. Dubbois County Farm Bureau Cooperative Ass'n, Inc.*,¹⁴⁰ the court declined to further extend the doctrine of intentional infliction of emotional distress in at will employment termination situations. The court declined to follow persuasive authority from California cited by the plaintiff. Instead, the court relied upon the decision in *Comfax*, which declined to recognize economic loss as a supportable claim for recovery of emotional distress damages.¹⁴¹ Thus, although the supreme court's recent holdings undermining the impact rule allowed for further development of the torts of intentional and negligent infliction

136. 586 N.E.2d 940 (Ind. Ct. App. 1992).

137. *Id.* at 942.

138. *Id.* at 942 (emphasis added).

139. *Id.*

140. 601 N.E.2d 5 (Ind. Ct. App. 1992).

141. *Id.* at 9.

of emotional distress, this year's court of appeals decisions reveal firm resistance against broadening their scope.

VI. APPLICATION OF THE BALANCING APPROACH ARTICULATED IN *WEBB V. JARVIS* TO DETERMINE WHETHER A DUTY IN TORT EXISTS

Last year the supreme court articulated a new test for determining whether a duty in tort exists. In *Webb v. Jarvis*,¹⁴² the court concluded that the existence of a duty in tort depends on the balancing of three factors: (1) the relationship between the parties, (2) the reasonable foreseeability of harm to the person injured, and (3) public policy concerns.¹⁴³ Indiana courts used this approach numerous times during 1992, particularly in the context of evaluating the relationship between the parties. One distinct relationship giving rise to a tort duty is that of landowner and entrants onto land. This section of the Article illustrates the merging of the *Webb* test into traditional premises liability analyses. Additionally, this section describes the more factually similar use of the test to determine the existence of a duty in preconception tort cases.

A. *Duty in Pre-conception Tort Cases*

The Indiana Supreme Court resolved a conflict among the court of appeals regarding the recognition in Indiana of a duty in tort owed to individuals prior to their conception. *Walker v. Rinck*,¹⁴⁴ and *Yeager v. Bloomington Obstetrics and Gynecology, Inc.*,¹⁴⁵ involved plaintiff-children who alleged that their respective mothers' physicians negligently failed to prescribe RhoGAM and thus caused their serious personal injuries.¹⁴⁶ In *Walker*, the Third District Court of Appeals declined to allow a cause of action for children injured as a result of a pre-conception tort committed against their mother.¹⁴⁷ Because the decision was rendered before *Webb*, the court did not rely on the three-factor balancing approach; rather, the court followed the reasoning espoused by the New York Court

142. 575 N.E.2d 992 (Ind. 1991).

143. *Id.* at 995.

144. 566 N.E.2d 1088 (Ind. Ct. App. 1991), *vacated*, 604 N.E.2d 591 (Ind. 1992).

145. 585 N.E.2d 696 (Ind. Ct. App. 1992), *aff'd*, 604 N.E.2d 598 (Ind. 1992).

146. The drug RhoGAM can prevent an Rh-negative woman from developing sensitivity to Rh-positive blood when administered during the pregnancy and delivery of the first Rh-positive child. Without treatment with RhoGAM, a woman develops antibodies which attack Rh-positive blood. These antibodies attack the blood cells of Rh-positive children both during the pregnancy and after birth until the antibodies are cleared from the child's system, thereby causing serious permanent injuries. *Id.* at 697. The Walkers also sued a medical laboratory alleging that the physician's failure to administer the RhoGAM was caused by the lab's erroneous analysis of Mrs. Walker's blood.

147. 566 N.E.2d at 1090.

of Appeals in *Albala v. City of New York*.¹⁴⁸ The *Albala* court disallowed a pre-conception tort claim in order to retain tort liability within manageable bounds.

In *Yeager*, the First District Court of Appeals disagreed with the majority in *Walker* and allowed the child plaintiff's claim.¹⁴⁹ Notably, the court in *Yeager* used the approach set forth in *Webb v. Jarvis*.¹⁵⁰ The court first rejected a blanket no-duty rule that would preclude all claims based on pre-conception torts. The *Yeager* court was influenced by Prosser and Keeton's critique of the *Albala* decision as a "thinly reasoned case."¹⁵¹ The *Yeager* court agreed with Prosser and Keeton's premise that, although some pre-conception torts should not be recognized because of serious problems related to proof and proximate causation,¹⁵²

148. 429 N.E.2d 786 (N.Y. 1981).

149. 585 N.E.2d at 697.

150. Notably, the court's application of the first two prongs of the *Webb* test drew largely upon the dissenting opinion in *Walker* written by Judge Staton. Written before the *Webb* decision, Judge Staton stated that, to determine the existence of a duty in negligence cases, "Indiana courts apply a foreseeability test tempered by a consideration of the relationship between the parties." *Walker*, 566 N.E.2d at 1090.

Judge Staton reasoned that the defendants knew or should have known of the risk flowing from a failure to administer RhoGAM to Mrs. Walker; and that Mrs. Walker's later-born children clearly constituted reasonably foreseeable victims of a breach of a duty to administer RhoGAM. *Id.* Further, Judge Staton readily found the requisite relationship between the defendants and the plaintiff children, based on two grounds. First, Judge Staton noted that courts have recognized that a tortfeasor who causes a direct injury to one member of the family may indirectly damage another because of the interconnected legal interests inherent in a family. *Id.* at 1091 (quoting *Schroeder v. Perkel*, 432 A.2d 834, 839 (1981) ("A family is woven of the fibers of life; if one strand is damaged, the whole structure may suffer.")).

Interestingly, Judge Staton bolstered his finding of the requisite relationship via the Medical Malpractice Act's definition of patient, which includes "a person having a claim of any kind, whether derivative or otherwise, as a result of alleged malpractice" *Id.* (quoting IND. CODE § 16-9.5-1-1(c) (Supp. 1992)). The definition of derivative claims includes "the claim of a . . . child . . . for loss of services, loss of consortium, expenses, and other similar claims." IND. CODE § 16-9.5-1-1(c) (Supp. 1992). Thus, precluding the plaintiffs' claims in *Walker* would, in essence, constitute an exclusion from "the class of 'patients' those individuals who were not physically present when the health care provider rendered services." *Walker*, 566 N.E.2d at 1090. Such a result would controvert the plain meaning of the Medical Malpractice Act.

Judge Staton also relied on cases from other jurisdictions. *E.g.*, *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250 (Ill. 1976) (recognizing a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother); *Monusko v. Postle*, 437 N.W.2d 367 (Mich. Ct. App. 1989) (recognizing a viable preconception tort against physicians who failed to immunize a mother from rubella who later contracted the disease while pregnant with the plaintiff).

151. 585 N.E.2d at 697 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, 855 (5th Ed. 1984)).

152. Such problems arise in cases involving from toxic chemicals or radioactive waste. *Id.* at 697-98.

a "blanket no-duty rule" which disallows all pre-conception claims should not be applied where proof and proximate cause problems do not exist.¹⁵³

The supreme court resolved the conflict in favor of the children through application of the *Webb* approach in *Walker v. Rinck*.¹⁵⁴ The court first disposed of two preliminary arguments. The supreme court clarified that "pre-conception" tort claims involve allegations that the defendant's tortious conduct is the cause of abnormalities in infants that would otherwise have been born normal and healthy.¹⁵⁵ Accordingly, the defendants' argument that the claim was precluded under Indiana Code section 34-1-1-11, which proscribes wrongful life claims based on negligently performed abortions,¹⁵⁶ was rejected.¹⁵⁷ The court also declined to leave the resolution of the issue to the legislature. The court reiterated that it is the traditional role of the highest court of the state to determine the common law of the state, even if the result is an innovative growth of the common law.¹⁵⁸ Moreover, the court noted that the recognition of a preconception tort would not be a "dramatic innovation" in Indiana because tort law allows infants to recover for injuries sustained as a result of defective products manufactured prior to the conception of the infant.¹⁵⁹

The court then applied the *Webb* analysis to determine that Dr. Rinck owed a tort duty to the Walker children. In evaluating the relationship between the parties, the court explained that a duty may be owed to a third party beneficiary of the consensual physician-patient relationship where the physician has actual knowledge that the services are being provided, in part, for the benefit of the third party.¹⁶⁰ Although Dr. Rinck could not have had actual knowledge of the Walker children before they were conceived, the court concluded that Dr. Rinck had actual knowledge that the only reason for the administration of RhoGAM was to protect the future children of Mrs. Walker.¹⁶¹ The court held that, "under those circumstances," Dr. Rinck owed a duty to the children which may have been breached when he failed to administer RhoGAM to their mother.¹⁶²

153. *Id.* at 698.

154. 604 N.E.2d 591 (Ind. 1992).

155. *Id.* at 594.

156. IND. CODE § 34-1-1-11 (1988) provides that "[n]o person shall maintain a cause of action . . . based on the claim that but for the negligent conduct of another he would have been aborted."

157. *Walker*, 604 N.E.2d at 593-94.

158. *Id.* at 594.

159. *Id.* (citing *Second Nat'l Bank v. Sears Roebuck & Co.*, 390 N.E.2d 229 (Ind. Ct. App. 1979) (negligent installation of a furnace)).

160. *Id.* at 594-95 (quoting *Webb v. Jarvis*, 575 N.E.2d 992, 996 (Ind. 1991)).

161. *Id.* at 595.

162. *Id.* It is interesting that the court used such conclusory language regarding the

The foreseeability factor of the *Webb* approach focuses on whether the person actually harmed was a foreseeable victim and whether the type of harm actually inflicted was reasonably foreseeable.¹⁶³ The court in *Walker* readily found the requisite foreseeability because the only medical reason for giving RhoGAM to Mrs. Walker was to prevent the exact injuries which occurred—injuries to the future children of Mrs. Walker caused by the antibodies which formed in Mrs. Walker when RhoGAM was given.¹⁶⁴ The court found that the administration of RhoGAM was a tort claim in this case. The court stated:

The administration of RhoGAM to a mother neither benefits nor harms the mother; it is given only to protect potential fetuses not yet conceived. Surely the public policy of this State follows and is coincident with the well-established medical practice of giving RhoGAM to an Rh negative mother who has given birth to an Rh positive child in order to protect future children of such mother from injury.¹⁶⁶

Based on the analysis of all three factors—relationship, foreseeability, and public policy¹⁶⁷—the court concluded that Dr. Rinck owed a duty to the Walker children to use reasonable care concerning the administration

duty before engaging in the analysis of the other two factors. Two inferences are that the relationship factor is (1) the most significant factor generally or (2) the most weighty factor in this case. As the following section of this article illustrates, lower courts seem uncertain of the appropriate application of the *Webb* approach. It is thus unfortunate that the court was unable to provide a clearer example.

163. *Webb v. Jarvis*, 575 N.E.2d 992, 997 (Ind. 1991).

164. *Walker*, 604 N.E.2d at 595.

165. *Id.* at 595 (citing *Webb*, 575 N.E.2d at 997 (“We believe that public policy and social requirements weigh most heavily against imposing a duty on physicians to consider unknown third persons in deciding whether or not to prescribe a course of drug therapy for a patient.”)).

166. *Id.* at 595.

167. In *Yeager*, the appellate court’s analysis of the public policy considerations delved into other areas. The *Yeager* court acknowledged the import of considerations such as the decision’s impact on the affordability of liability insurance and the availability of obstetrical care, yet found that the Indiana Medical Malpractice Act adequately addresses these concerns through protections such as an occurrence statute of limitations, a cap on the total amount recoverable, and a panel to review all proposed medical malpractice complaints. *Yeager*, 585 N.E.2d at 699. The court found that “the legislature has preempted this area and that all further ‘blanket’ type protections designed to ensure that tort claims remain within manageable bounds should be implemented by our legislature.” *Id.* at 699.

of RhoGAM to their mother.¹⁶⁸ The supreme court also summarily affirmed the opinion of the court of appeals in *Yeager*.¹⁶⁹ Notably, the analysis of the *Webb* factors in both the *Walker* and *Yeager* cases hinged on the specific purpose of the drug RhoGAM. Although the court adopted the notion that a "blanket no-duty" rule which precludes all pre-conception claims is unnecessary, the recognition of a tort duty in other pre-conception tort cases may not be so readily achieved.

B. Merging the Webb Test Into Premises Liability Cases

Several decisions during the survey period explored the doctrine of premises liability in light of the supreme court's decisions in both *Webb v. Jarvis*¹⁷⁰ and *Burrell v. Meads*.¹⁷¹ The *Webb* approach should be invoked in premises liability cases to assist in the determination of whether a duty in fact exists. *Burrell* should then be followed to determine the scope of that duty. In Indiana, the scope of the tort duty owed to a person entering the land of another is determined in accord with the person's status as a trespasser, a licensee or an invitee. The highest duty is owed to invitees.¹⁷² In *Burrell*, the supreme court discarded the "economic benefit test" and, instead, adopted the Restatement's invitation test to decide who qualifies as an invitee.¹⁷³

168. *Walker*, 604 N.E.2d at 595. The court similarly held that the second defendant, the laboratory which erroneously reported that Mrs. Walker had Rh-positive blood, owed a duty to use reasonable care in analyzing Mrs. Walker's blood. *Id.* On remand, one issue will therefore be whether Dr. Rinck breached his duty in light of the facts that Mrs. Walker, who was a nurse, informed Dr. Rinck that she was Rh-negative, yet the laboratory reported that she was Rh-positive.

Additionally, the supreme court reversed the court of appeals' finding that, even assuming a cause of action for the preconception tort, in this case the parents' conduct constituted an intervening, superseding cause. *Id.* at 596. Depositions revealed that the parents were aware of the Rh sensitization in 1979, three years after the birth of their first Rh-positive child. One of the child plaintiffs, their second child, was born in 1981. The other child plaintiffs were twins born to the Walkers in 1985; one twin was Rh-positive, the other was Rh-negative. The appellate court found that the parents' conduct in conceiving children with knowledge of the Rh sensitization was an intervening, superseding cause of the children's injuries. *Walker*, 566 N.E.2d at 1090. The supreme court disagreed, however, because "[a] superseding, intervening cause sufficient to break the causal chain . . . must be one that is not 'foreseeable' at the time of the wrongful conduct." *Walker*, 604 N.E.2d at 596. A failure to administer RhoGAM leads to totally foreseeable consequences.

169. See *Yeager v. Bloomington Obstetrics and Gynecology, Inc.*, 604 N.E.2d 598, 599 (Ind. 1992).

170. 575 N.E.2d 992 (Ind. 1991).

171. 569 N.E.2d 637 (Ind. 1991).

172. The duty owed to invitees is outlined in the RESTATEMENT (SECOND) OF TORTS § 343 (1965).

173. 569 N.E.2d at 642.

An instructive case on the interplay between the tests in *Webb* and *Burrell* is *Kinsey v. Bray*.¹⁷⁴ In *Kinsey*, the plaintiff, Vontris Kinsey, brought suit against her former husband, Rex Kinsey, for failure to protect her from harm inflicted by Rex's girlfriend, Linda Bray. The court applied *Webb's* balancing approach to resolve whether Rex owed a duty to Vontris to protect her from Linda. The court first analyzed the relationship prong of the test. The court noted that section 315 of the Restatement prescribes that there is no duty to control the conduct of a third party to prevent harm to another unless (a) a special relationship exists between the actor and the third party which imposes a duty, or (b) a special relationship exists between the actor and the other which gives rise to protection.¹⁷⁵ Thus, the relationship factor required analysis of the relationship between Rex and Linda, as well as between Rex and Vontris.

To resolve whether a special relationship existed between Rex and Linda under prong (a), the court relied on section 318 of the Restatement. That section requires a possessor of land, if present, to exercise reasonable care to control the conduct of licensees to prevent intentional harm to others or unreasonable risks of bodily harm to others in certain circumstances—namely, when the possessor knows he has the ability to control the third party and knows of the necessity and opportunity for exercising control.¹⁷⁶ The court found that the trier of fact could have concluded that Rex knew he could have controlled Linda by asking her to leave the premises, and further, that the trier of fact could have concluded that Rex knew he should have ordered Linda to leave due to Linda's past threats and animosity aimed at Vontris and her violent tendencies. Moreover, the court held that section 318 would apply to Linda even though under Indiana law a social guest is deemed an invitee rather than a licensee.¹⁷⁷ The court thus concluded that the relation between Linda and Rex gave rise to a duty to control Linda's conduct.

To determine whether a duty could be found based on the relationship between Rex and Vontris under prong (b) of section 315, the court looked to section 314A of the Restatement, which lists special relations that give rise to a duty to aid or protect.¹⁷⁸ Relations listed in section 314A of the Restatement include the relationship between the landowner who holds his land open to the public and public invitees. Under *Burrell*, the standard

174. 596 N.E.2d 938 (Ind. Ct. App. 1992).

175. *Id.* at 940 (quoting RESTATEMENT (SECOND) OF TORTS § 315 (1965)).

176. *Id.* at 940 (quoting RESTATEMENT (SECOND) OF TORTS § 318 (1965)). The court noted that the Indiana Supreme Court has cited this section as generally helpful. *Id.* (citing *Gariup Constr. Co., Inc. v. Foster*, 519 N.E.2d 1224, 1229 (Ind. 1988)).

177. *Id.* at 940 (citing *Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991)).

178. *Id.* at 941.

of care accorded the public invitee, the business visitor, and the social guest are equal;¹⁷⁹ therefore, the court held that the law recognizes a duty on the part of landowners to protect social invitees as well.¹⁸⁰

Because the landowner's duty to protect invitees against unreasonable risk of harm extends to risks arising out of the condition of the land, the issue became whether a third party's presence or conduct could constitute a "condition on the land."¹⁸¹ This issue was resolved affirmatively based on *Glen Park Democratic Club, Inc. v. Kylsa*,¹⁸² in which a defendant tavern owner was found to have a duty to protect one patron from another patron known to be violent, even though no defect or dangerous condition existed in the premises themselves.¹⁸³ Consistent with the disjunctive language of section 315 of the Restatement, the court held that a tort duty could be found on the facts of the case based on Rex's relation to either Vontris or Linda, or both.

The court only briefly examined the other two factors of the *Webb* approach: foreseeability and public policy. The foreseeability factor focuses on whether the person actually harmed was a foreseeable victim, and whether the type of harm actually inflicted was reasonably foreseeable.¹⁸⁴ The facts in *Kinsey* readily satisfied both criteria.¹⁸⁵ In premises liability cases, public policy concerns which favor the imposition of a duty include the willingness to hold a possessor of land liable because he ordinarily is in the best position to discover dangers associated with his property and is often responsible for creating them.¹⁸⁶ In this case, Rex invited Linda and Vontris to his premises despite Linda's violent tendencies and past threats to harm Vontris. On these facts, the court found it reasonable and within public policy considerations to impose on Rex the burden to warn Vontris, or to order Linda from his premises.¹⁸⁷

179. *Burrell* held that social guests qualify as invitees. 569 N.E.2d at 643.

180. *Kinsey*, 596 N.E.2d at 941.

181. *Id.*

182. 213 N.E.2d 812 (1966).

183. *Kinsey*, 596 N.E.2d at 942.

184. *Id.* at 943.

185. Vontris was a foreseeable victim because Rex knew that Linda had threatened to physically harm Vontris. The type of harm — physical injury by Linda — was thus reasonably foreseeable as well.

186. *Kinsey*, 596 N.E.2d at 943 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 57, at 386 (5th Ed. 1984)).

187. *Id.* The court also rejected Rex's contention, based on section 343(b) of the Restatement, that Vontris could not prove that Rex should have expected that she could "not discover or realize the danger or [would] fail to protect herself against it." *Id.* at 944. The court noted that Vontris produced evidence that Rex did not inform her of Linda's threats and did not tell her he had invited Linda to his premises when she was also to be present. *Id.*

Kinsey is a good example of the need to consider all three factors of the *Webb* test in determining the existence of a duty in tort. Unfortunately, because all three factors were so readily satisfied, the case sheds little light on the appropriate weight to accord each factor in the balance. As the following discussion reveals, other significant premises liability cases did not incorporate the *Webb* balancing approach in determining the existence of a tort duty, but, instead explored the impact of *Burrell v. Meads* on tort duty.

In *Jump v. Bank of Versailles*,¹⁸⁸ the appellate court applied both prongs of the invitation test adopted in *Burrell* to determine whether the claimant was a public invitee of one defendant and a business visitor of the second defendant.¹⁸⁹ Judy Jump slipped on ice accumulated on steps which led from a parking area to a sidewalk which funneled into a cross-alley between two buildings, one owned by defendant Bank of Versailles and the other by defendant Hunter. Jump worked for a tenant in Hunter's building. Although a customer of the bank, Jump traversed the steps the morning of the incident in order to enter her place of employment. The bank owned the entire sidewalk area between the buildings and had maintained the steps and sidewalk for the ten years the cross-alley had existed. Jump noticed that the parking lot and railing were icy, but had observed a co-worker safely use an adjacent set of steps. The court's analysis as to both defendants focused on Jump's status while on the steps. The analysis as to the bank's liability seemed to presume a tort duty existed and, accordingly, the court relied on *Burrell* to determine the scope of that duty. As to defendant Hunter, the court focused on whether Hunter owed a duty in tort. The court's failure to use the *Webb* approach is thus troublesome.

The court first found that Jump did not qualify as a business visitor of the bank.¹⁹⁰ The court then reiterated that Jump may qualify as a

188. 586 N.E.2d 873 (Ind. Ct. App. 1992).

189. The RESTATEMENT (SECOND) OF TORTS § 332 (1965) provides that the following persons qualify as invitees:

- (1) An invitee is either a public invitee or a business visitor;
- (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public;
- (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.

190. *Jump*, 586 N.E.2d at 877. The court explained that if Jump had intended to use the cross-alley to reach the front of the bank to use an automatic teller machine or to make a night deposit, the Restatement test might have been satisfied; i.e., her purpose would have been "directly or indirectly connected with business dealings with the possessor of land as required by § 332(3)." *Id.* (citing *Burrell v. Meads*, 569 N.E.2d 637, 642 (Ind. 1991)).

public invitee if she was "invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public."¹⁹¹ Following *Burrell*, the court noted that a necessary first step is to scrutinize the bank's explicit and implicit invitation to the public to use the steps.¹⁹² The general public had used the steps for many years; the bank had never posted signs restricting access to the cross-alley; and the bank had maintained the steps to assure safe passage through the years. Accordingly, the court readily found that the bank's invitation was sufficiently broad to encompass all pedestrians using the steps and the cross-alley, irrespective of the purpose,¹⁹³ and held that Jump qualified for invitee status as a public invitee.¹⁹⁴

The court next addressed whether Jump qualified as a business invitee of Hunter even though Hunter did not own the land upon which her accident occurred.¹⁹⁵ The court distinguished a number of cases in finding that Hunter owed no duty to Jump. *Snyder Elevators, Inc. v. Baker*¹⁹⁶ held that a business owner may owe a duty to a member of the general public off its business premises when the owner maintains a hazardous condition or conducts a hazardous activity on the premise beyond the mere operation of the business which causes an off-premise injury.¹⁹⁷ The court readily distinguished *Snyder* because Hunter did not maintain a hazardous condition or conduct an activity which caused the injury.¹⁹⁸ *Ember v. B.F.D., Inc.*¹⁹⁹ held that a business owner's duty of care may extend off-premises only when it is reasonable for the invitees to believe that the invitor controls the adjacent premises or knows that his invitees customarily use the adjacent premises in connection with the invitation.²⁰⁰ *Ember* was more relevant to Jump's action since Hunter impliedly encouraged Jump to use the steps by providing access into the building through a door on the cross-alley. The court distinguished *Ember*, however, because it involved a criminal assault by a third person in a parking lot adjacent to a tavern and thus had greater public policy implications.²⁰¹

191. *Id.* at 877 (quoting RESTATEMENT (SECOND) OF TORTS § 332(2) (1965)).

192. *Id.* at 877. *Burrell* stressed that it is first necessary to examine the invitation itself. 569 N.E.2d at 642.

193. *Jump*, 586 N.E.2d at 877-78.

194. *Id.* at 878.

195. The issue therefore was whether a landowner may be held liable to an employee of a lessee for an injury which occurs on adjoining property.

196. 529 N.E.2d 855 (Ind. Ct. App. 1988).

197. *Id.* at 858.

198. *Jump*, 586 N.E.2d at 879.

199. 490 N.E.2d 764 (Ind. Ct. App. 1986).

200. *Id.* at 772.

201. *Jump*, 586 N.E.2d at 879. The court in *Jump* also readily distinguished two other cases. In *Smith v. Syd's, Inc.*, 570 N.E.2d 126 (Ind. Ct. App. 1992), *aff'd*, 598

The court then adopted the persuasive reasoning from other jurisdictions where courts have held: (1) a landowner has no duty to maintain adjacent lands simply because the public chooses to use such lands if the landowner provides a safe means of ingress and egress,²⁰² (2) the duty to provide safe ingress and egress includes a duty to warn of hazards located near property boundaries,²⁰³ and (3) the duty to warn of hazards includes the duty to warn of unsafe ways of ingress and egress beyond the premises.²⁰⁴ The court then concluded that Hunter owed Jump no duty while on the bank's property, and further, that even if Hunter did assume such a duty by furnishing Jump with a key to the side door of Hunter's building, Hunter fulfilled that duty by providing a separate means of ingress and egress through the steps on Hunter's property.²⁰⁵ Although the court agreed that *Burrell* significantly expanded the concept of premises liability, the court declined to extend the protection afforded by invitee status to include a landowner's patrons, or lessees' employees, who are injured on adjoining property, where the landowner has "not created a dangerous condition affecting the adjoining property *and* invited their invitees to use such property."²⁰⁶

C. The Duty Owed to Child Invitees

The scope of the duty owed to child invitees was clarified in *Johnson v. Pettigrew*.²⁰⁷ In *Johnson*, the parents of a thirteen year old son, Jeff, sought recovery from landowners who were parents of Jeff's friend, Joel. Because Jeff's injury occurred when 'Jeff visited the Pettigrew's farm as a social guest, Jeff readily qualified as an invitee. The court first reiterated

N.E.2d 1065 (Ind. 1992), persons injured while using a staircase jointly owned and maintained qualified as invitees in relation to both owners. Although common usage was a factor in *Smith*, the court in *Jump* found that actual ownership and maintenance were determinative of Smith's invitee status; and the Bank and Hunter did not share ownership or maintenance expenses. *Jump*, 586 N.E.2d at 879. And *Justice v. CSX Transp., Inc.*, 908 F.2d 119 (7th Cir. 1990) (construing Indiana law), was distinguished as involving a man-made condition on the owner's property which obstructed the view of a plaintiff off-premises who then collided with an oncoming train.

202. *Jump*, 586 N.E.2d at 880 (citing *Chimente v. Adam Corp.*, 535 A.2d 528 (N.J. Super. Ct. 1987)).

203. *Id.* (citing *Rockefeller v. Standard Oil Co.*, 523 P.2d 1207 (Wash. Ct. App. 1974)).

204. *Id.* at 880-81 (citing *Piedalue v. Clinton Elementary Sch. Dist.*, 692 P.2d 20 (Mont. 1984); *Carter v. City of Houma*, 536 So.2d 573 (La. App. 1988) (no duty to warn of dangers on abutting property unless landowner creates or causes the defect and invites others to use the adjoining property)).

205. *Jump*, 586 N.E.2d at 881.

206. *Id.* at 882 (emphasis in original).

207. 595 N.E.2d 747 (Ind. Ct. App. 1992).

that a child licensee or invitee is entitled to a higher standard of care than a child trespasser.²⁰⁸ The court then determined that the duty owed to adult invitees, as set forth in section 343 of the Restatement and applied by the court in *Burrell* to social guests, is properly applicable to child invitees, taking into account the abilities, age, experience, and maturity of the child invitee.²⁰⁹ The Johnsons alleged that the Pettigrew's breached this duty.

In *Johnson*, the Pettigrews instructed Jeff and Joel to burn debris, under the supervision of a hired hand and Joel's eighteen year old brother, while they ran errands off the premises. The boys grew bored with the task and started a separate fire out of sight of their supervisors. They then filled a plastic jug partly full of gasoline from an unlocked pump on the farm, laid the jug on its side, and took turns stomping on it to propel the gasoline into the fire, causing small explosions. Gasoline splattered onto Jeff, and he caught fire and sustained second and third-degree burns. The Johnsons alleged that, by allowing a gas pump on the farm to remain unlocked while they left the premises, the Pettigrews failed to exercise reasonable care to protect Jeff against the danger of fire.

In determining whether the Pettigrews breached their duty of care to Jeff, the court drew upon the doctrine of open and obvious dangers. That doctrine provides that a landowner is not liable to invitees for physical harms caused to them by any activity or condition on the land whose danger is known or obvious to them.²¹⁰ When applied to a child invitee, the doctrine narrows its protection to the landowner: "The child's ignorance of [a condition that would appear open and obvious to an adult] . . . would trigger the duty to warn on the part of the occupier of land, even though there might be no duty to warn an adult in the same position."²¹¹ The record revealed that Jeff had been instructed about

208. *Id.* at 750 (quoting RESTATEMENT (SECOND) OF TORTS §§ 343B and § 339 (1965)). The court stated:

Our courts have extended greater protection to child licensees than to child trespassers, requiring the landowner to factor the child's youth and lack of experience in the assessment of the ability of a child to perceive and avoid danger. *Swanson v. Shroat* (1976), 345 N.E.2d 872, 877 *reh'g denied*. Thus, if the landowner can anticipate that a child will not perceive a danger obvious to adults, in the exercise of reasonable care he may be required to take additional precautions to protect his child licensees.

Id.

209. *Id.* at 751. "The child's ignorance of [a condition that would appear open and obvious to an adult] . . . would trigger the duty to warn on the part of the occupier of land, even though there might be no duty to warn an adult in the same position." *Id.* (quoting *Collier v. Necaise*, 522 So.2d 275, 278-79 (Ala. 1988)).

210. *Id.* at 751 (quoting RESTATEMENT (SECOND) OF TORTS § 343A (1965)).

211. *Id.* at 751 (quoting *Collier v. Necaise*, 522 So.2d 275, 278-79 (Ala. 1988)).

the dangers of fire and of the perils of throwing gasoline into fire. Further, the boys had testified that they engaged in the activity precisely to witness the resulting explosions.

Although the Johnsons argued that Jeff did not fully understand the risks of his actions, the court determined that the law did not require the Pettigrews to protect Jeff from a danger on their premises of which he was fully aware, yet consciously disregarded.²¹² Thus, the court in *Johnson* clarified that landowners owe a higher duty of care to child invitees, even as to open and obvious dangers. At the same time, the decision rather harshly reaffirms that children will be held accountable for reckless conduct, such as engaging in a hazardous activity despite a minimum understanding of its dangerousness.

VII. INDIANA TORT CLAIMS ACT

A. Incapacity Under the Tort Claims Act

In 1989, the Indiana General Assembly amended the Tort Claims Act to redefine persons exempt from the stringent requirement that governmental entities be given notice of a tort claim within 180 days.²¹³ The 1989 amendments replaced the term "incompetent" with the term "incapacity."²¹⁴ Under the previous version of the Tort Claims Act, "incompetent" was defined to include "a person who is under the age of eighteen (18) years"²¹⁵

In *South Bend Community Schools Corp. v. Widawski*,²¹⁶ the Indiana Court of Appeals construed the recent amendments to the Tort Claims Act, which substituted the term "incapacity"²¹⁷ for "incompetency." In *Widawski*, a minor was injured while participating in school gym class. Notice of the minor's tort claim was not served upon the defendant until two years after the injury. The *Widawski* court held that the 180 day

212. *Id.* at 752 (citing RESTATEMENT (SECOND) OF TORTS § 343A (1965); *Collier v. Necaie*, 522 So.2d 275 (Ala. 1988)); *Sampson by Sampson v. Zimmerman*, 502 N.E.2d 846 (Ill. App. Ct. 1986)). As to the Johnson's claim for negligent failure to supervise, the court also held that it could not state, as a matter of law, that the Pettigrews fulfilled their duty to exercise ordinary care which arose when the Johnsons entrusted them with Jeff.

213. IND. CODE § 34-4-16.5-8 (Supp. 1992).

214. *Id.*

215. *South Bend Comm. Sch. Corp. v. Widawski*, 602 N.E.2d 1045, 1045 (citing IND. CODE § 34-4-16.5-2(d) (1988)).

216. *Id.*

217. As used in the amendments to the Indiana Tort Claims Act, incapacity has the meaning found in Indiana Code section 29-3-1-7.5. See IND. CODE § 34-4-16.5-2(d) (Supp. 1992).

notice requirement of the Indiana Tort Claims Act²¹⁸ was not tolled by reason of the plaintiff's minority, and her action was therefore barred against the school.²¹⁹

The court of appeals reasoned that the General Assembly's removal of the express reference to minors from the Tort Claims Act²²⁰ and substitution of a definition of incapacity,²²¹ which did not explicitly include minors, led to the conclusion that minors were not to be considered "incapacitated" and could no longer rely upon a tolling of the Tort Claims Act notice requirements for preservation of a claim against a governmental entity.²²²

The current statutory definition of an "incapacitated person" includes "persons who are unable to manage in whole or in part their property or self-care or both, as a result of" insanity, mental illness, mental deficiency, physical illness, infirmity, habitual drunkenness, excessive use of drugs, incarceration, confinement, detention, duress, fraud, undo influence of others on the individual, or "other incapacity."²²³ The *Widawski* decision specifically refused to qualify minors as "incapacitated persons" under the catch-all category of "other incapacity" causing inability to manage in whole or in part the individual's property or self-care.²²⁴

The potential ramification of *Widawski* is that a two year old child is now required to give tort claims notice within 180 days or waive a claim against the governmental entity causing injury. Certainly, such a result is not consistent with our society's protection of minors.²²⁵ Further, the *Widawski* decision creates a conflicting result between actions subject to tort claims notice and actions subject only to a statute of limitation. Statutes of limitation are tolled during minority,²²⁶ while after *Widawski*, Tort Claims Act notice requirements are not tolled. The application of two contradictory rules, depending on whether the defendant is a governmental entity or not, creates unnecessary confusion in the law.²²⁷

Yet, the most disturbing aspect of the court of appeals' unwillingness to extend the protection of "other incapacity" to minors is that they

218. IND. CODE § 34-4-16.5-8 (1988).

219. *South Bend Community Sch. Corp.*, 602 N.E.2d at 1045.

220. IND. CODE § 34-4-16.5-2(d) (Supp. 1992).

221. *Id.*

222. 602 N.E.2d at 1045-46.

223. IND. CODE § 29-3-1-7.5 (Supp. 1992).

224. 602 N.E.2d at 1046.

225. Arguably, the *Widawski* opinion does at least leave room for creation of an exception for infants.

226. *E.g.*, IND. CODE §§ 34-1-2-5 and 1-1-4-5-21 (1988).

227. It must be noted that the Tort Claims Act's notice requirement is not *per se* a statute of limitation, but rather a "procedure precedent." *City of Fort Wayne v. Cameron*, 370 N.E.2d 338 (Ind. 1977). However, regardless of the arbitrary nomenclature assigned, the practical effect is that of a statute of limitation.

are *per se* unable to manage *at least* in part their property or self-care because of *legal incapacity*. The law of Indiana is replete with examples of the undeniable legal incapacity under which minors operate. Minors²²⁸ are not competent to enter into contracts,²²⁹ may not initiate litigation on their own behalf²³⁰ or settle legal disputes,²³¹ and may not consent to an abortion,²³² or any medical or health care.²³³ It is difficult to perceive of a broad class of persons that more definitively qualifies under the catch-all language of "other incapacity" causing inability to manage in "whole or in part" their property or self-care.²³⁴ Hopefully, the supreme court will ultimately have the final word on construction of the recent amendments to the Tort Claims Act concerning the requirement of minors to give notice within 180 days.

B. Immunity Under the Tort Claims Act

Another significant development under the Tort Claims Act is the supreme court's narrowing of the immunity conferred on law enforcement officers and their employers in *Tittle v. Mahan*.²³⁵ The court consolidated two cases involving allegedly negligent treatment of pre-trial detainees to determine the scope of the immunity provision exempting negligent enforcement of a law under Indiana Code section 34-4-16.5-3(7).²³⁶ The case provides an excellent history of the law of sovereign immunity in Indiana. In particular, the supreme court wished to revisit the issue addressed in *Seymour National Bank v. State*,²³⁷ where the court concluded that the state was immune from liability for the alleged negligence of a state trooper in operating his police car during a high speed chase. In *Seymour*, the court's dicta suggested that any act within the scope of a law enforcement official's employment is immune under section 3(7) of

228. A minor is a person less than eighteen (18) years of age. IND. CODE § 1-1-4-5(6) (Supp. 1992).

229. *Mullen v. Tucker*, 510 N.E.2d 711 (Ind. Ct. App. 1987). *See also* IND. CODE §§ 34-1-25.5 and 27-1-12-15 (1988). Actually, a minor is not *per se* incompetent under the common law, but rather may simply void the contract at her option. However, the practical implication is exactly the same to the extent third parties would refuse to do business with a minor based upon her status.

230. IND. CODE § 34-2-3-1 (1988).

231. *Id.* §§ 29-3-9-7 and 29-3-3-1 (Supp. 1992)).

232. *Id.* § 35-1-58.5-2 (1988).

233. *Id.* § 16-8-12-2 (1992).

234. *Id.* § 29-3-1-7.5 (Supp. 1992).

235. 582 N.E.2d 796 (Ind. 1991)

236. The court also addressed the same immunity provision in the companion case of *City of Wakarusa v. Holdeman*, 582 N.E.2d 802 (Ind. 1991).

237. 422 N.E.2d 1223 (Ind. 1981), *modified on reh'g.*, 428 N.E.2d 203 (Ind. 1981).

the Tort Claims Act.²³⁸ The supreme court did not agree with the broad application of *Seymour* in numerous appellate court decisions.²³⁹

In *Tittle*, the supreme court held that the legislature did not intend section 3(7) of the Tort Claims Act to provide immunity co-extensive with the statutory obligations placed on law enforcement officials.²⁴⁰ The court invoked two rules of statutory construction to reach that conclusion: (1) a statute such as the Tort Claims Act which is in derogation of the common law must be strictly construed against limitations on a claimant's right to bring suit; and (2) when a legislature enacts a statute in derogation of the common law, courts presume that the legislature is aware of the common law and thus does not intend to make changes beyond what it expressly declares.²⁴¹ The court concluded that the plain meaning of "enforcement of the law" does not include activities associated with the administration of pre-trial detainees—rather, the phrase is limited to those activities attendant to effecting the arrest of those who may have broken the law.²⁴²

That interpretation of section 3(7) of the Tort Claims Act was applied in the companion case of *City of Wakarusa v. Holdeman*,²⁴³ where the supreme court held that a deputy was not "enforcing the law" when he rear-ended a motorist while watching in his rear view mirror for license plate violations. Similarly, in *City of Valparaiso v. Edgecomb*,²⁴⁴ the supreme court held that section 3(7) does not confer immunity to a police officer who negligently causes a collision while engaged in leading a funeral procession. In *City of Wakarusa*, the court stated that "absent immunity, the controlling question becomes whether defendants owed plaintiff a private duty for the breach of which the law permits a recovery. It is undisputed that a person operating a motor vehicle on a public

238. 428 N.E.2d at 204.

239. *Tittle*, 582 N.E.2d at 800 (citing *Indiana State Police v. May*, 469 N.E.2d 1183 (Ind. Ct. App. 1984) (plaintiff's home damaged by canisters of tear gas fired while apprehending fleeing murder suspect); *Weber v. City of Fort Wayne*, 511 N.E.2d 1074 (Ind. Ct. App. 1987) (protected act of assisting another officer in investigation of personal injury accident); *City of Gary v. Cox*, 512 N.E.2d 452 (Ind. Ct. App. 1987) (failure to guard a prisoner who escaped and shot bystander); *McFarlin v. State*, 524 N.E.2d 807 (Ind. Ct. App. 1988) (giving flares at scene of accident to driver who was struck while setting out flares)).

240. *Id.* at 800-01.

241. *Id.* at 800 (citing *Collier v. Prater*, 544 N.E.2d 497, 498 (Ind. 1989); *State Farm Fire & Cas. Co. v. Structo Div., King Secley Thermos Co.*, 540 N.E.2d 597, 598 (Ind. 1989)).

242. *Id.* at 801. The court distinguished *Seymour* as a case in which the phrase "enforcement of the law" was not ambiguous because the defendant officer was in fact engaged in effecting an arrest. *Id.* at 800-01.

243. 582 N.E.2d 802 (Ind. 1991).

244. 587 N.E.2d 96 (Ind. 1992).

roadway has a duty to operate such vehicle with reasonable care.”²⁴⁵ Accordingly, it is now clear that courts will narrowly construe the immunity granted to law enforcement officers under the Tort Claims Act: immunity extends only to negligent commission of “activities attendant to effecting [an] arrest.” Beyond administrative duties, many activities conducted in the course of daily law enforcement must conform with the tort duty of reasonable care.

245. 582 N.E.2d at 804.

Survey of 1992 Developments in the Indiana Law of Product Liability

STEVEN K. HUFFER*
RANDAL M. KLEZMER**

The 1992 survey period saw several important decisions affecting the Indiana Product Liability Act, Indiana Code section 33-1-1.5-1. Both Indiana and federal courts have addressed the applicability of the Indiana statute of repose,¹ the incurred risk defense,² the validity of a failure to warn claim,³ the open and obvious danger defense,⁴ the state of the art defense,⁵ and the statutory definitions of a product⁶ and a defective product.⁷

I. STATUTE OF REPOSE AND SUBSEQUENT PRODUCT MODIFICATIONS

In *Stump v. Indiana Equipment Co.*,⁸ the Indiana Court of Appeals for the Second District held that the ten-year repose statute for product liability actions applies only if the alleged defect was present at or before the time the product was delivered to its initial user.⁹ In reaching this conclusion, the court of appeals reversed summary judgment for Indiana Equipment Co., the seller of the subject product, a highway grader, and reinstated the claim. The court reasoned that a "product liability action," as contemplated by the statute of repose, is an action in which the plaintiff complains of a defect that existed at or before the time the product was delivered by the seller to the initial user or consumer.¹⁰

The plaintiff in *Stump* contended that he was injured as a result of an improperly wired safety switch. At the time of the accident, the plaintiff was standing next to the machine checking the source of an

* Partner, Mitchell Hurst Jacobs & Dick, Indianapolis. B.A., 1981, Carleton College; J.D., 1984, Indiana University School of Law—Indianapolis.

** Associate, Bleecker Brodey & Andrews, Indianapolis. B.S., 1989, Indiana University; J.D., 1992, Indiana University School of Law—Indianapolis.

1. *Stump v. Indiana Equip. Co.*, 601 N.E.2d 398 (Ind. Ct. App. 1992).

2. *Kochin v. Eaton Corp.*, 797 F. Supp. 679 (N.D. Ind. 1992).

3. *York v. Union Carbide Corp.*, 586 N.E.2d 861 (Ind. Ct. App. 1992).

4. *Phillips v. Cameron Tool Corp.*, 950 F.2d 488 (7th Cir. 1991).

5. *Id.*

6. *Sapp v. Morton Bldgs., Inc.*, 973 F.2d 539 (7th Cir. 1992).

7. *Peters v. Judd Drugs, Inc.*, 602 N.E.2d 162 (Ind. Ct. App. 1992).

8. 601 N.E.2d 398 (Ind. Ct. App. 1992).

9. *Id.* at 402.

10. *Id.* at 401.

oil leak. As he turned on the grader, it rolled backward, crushing both of his legs. In bringing his action, the plaintiff contended that a properly wired neutral safety switch would have prevented the grader from moving while in gear.

The parties did not dispute the fact that the machine was rewired after it was delivered to the initial user by Indiana Equipment in 1967. Indiana Equipment Co. repaired the wiring during 1985, the year before Stump's injuries. Stump filed suit in 1988, and Indiana Equipment moved for summary judgment on the grounds that the action was time-barred under the ten-year statute of repose.

In reaching its holding, the court of appeals addressed the purpose behind the Indiana statute of repose in the context of the present action. The court stated that the statute's "purpose was to place a temporal limit upon liability for a product's defects."¹¹ However, the court said, "[I]t does not follow that *all* parties are absolved of liability for *all* claims of negligence concerning a particular product when more than ten years has elapsed since that product was delivered to the initial user. Our legislature simply could not have intended such a wide-sweeping result."¹²

The court said its holding preserves an incentive for care in inspecting, handling, and maintaining products that are more than ten years old.¹³ Thus, according to the court, the ten-year statute of repose, which begins to run at the time of delivery, will not bar actions involving post-sale negligence, as opposed to a defect present at the time of that initial delivery.

The court in *Stump* distinguished its holding from the decision of the Indiana Supreme Court in *Dague v. Piper Aircraft Corp.*¹⁴ In *Dague*, the court held that the ten-year statute of repose commences to run upon the delivery of the product to the "initial user or consumer."¹⁵ *Dague*, however, involved defects that existed at the time of sale. In *Stump*, the wiring did not become allegedly defective until 1985, several years after the sale. Furthermore, the Indiana Code section 33-1-1.5-2.5 provides that the statute of repose applies to defects present "at the time it is conveyed by the seller to another party."¹⁶ Therefore, according to *Stump*, the statute of repose applies only to actions in which the plaintiff complains of a defect which existed at or before the time the product was delivered by the seller to the initial user or consumer.¹⁷

11. *Id.*

12. *Id.* at 402.

13. *Id.*

14. 418 N.E.2d 207 (Ind. 1981).

15. *Id.* at 210.

16. IND. CODE § 33-1-1.5-2.5 (1983).

17. *Stump*, 601 N.E.2d at 398.

II. BYSTANDER ASSUMPTION OF RISK

In *Kochin v. Eaton Corp.*,¹⁸ a bystander injured when a coworker backed a forklift into her brought a product liability action alleging that the forklift was unreasonably dangerous because the manufacturer failed to install a rear view mirror, a back-up alarm horn, or a flashing warning lamp, all of which would aid the forklift operator in ascertaining whether someone was behind the forklift or indicate to a bystander when the forklift was running in the reverse.¹⁹ In response, the manufacturer pled the defense of assumption of risk.²⁰ The plaintiff, on the other hand, argued that because she was neither a user nor a consumer of the forklift, the affirmative defense of assumption of the risk did not apply.²¹

The United States District Court for the Northern District of Indiana held that the manufacturer could raise the affirmative defense of assumption of risk even though the plaintiff, a bystander, was not a user or consumer of the product.²² The court reasoned that, under the facts of the case, the only person who could assume the risk (the risk that someone would be injured due to a lack of warning device) would be a bystander, and not the forklift operator.²³

In reaching this conclusion, the court in *Kochin* conducted an independent investigation of cases in every state as to whether the assumption of risk defense is available in a bystander case.²⁴ In two of these cases, *Masterman v. Veldman's Equipment, Inc.*²⁵ and *Barr v. Rivinius, Inc.*,²⁶ the courts held that the assumption of risk defense did not apply to plaintiff-bystanders. In three other cases, however, *FMC Corp. v. Brown*,²⁷ *Gilbert v. Stone City Construction Co.*,²⁸ and *Baker v. Chrysler Corp.*,²⁹ it was recognized that an incurred risk instruction is applicable in cases in which the plaintiff is a bystander. The court in *Kochin* agreed with the position taken by the courts in *Brown*, *Gilbert*, and *Baker* that an incurred risk instruction is applicable in cases where the plaintiff is a bystander.³⁰

18. 797 F. Supp. 679 (N.D. Ind. 1992).

19. *Id.* at 681.

20. *Id.* at 683.

21. *Id.*

22. *Id.* at 684.

23. *Id.* at 685.

24. *Id.* at 684.

25. 530 N.E.2d 312 (Ind. Ct. App. 1988).

26. 373 N.E.2d 1063 (Ill. App. Ct. 1978).

27. 551 N.E.2d 444 (Ind. 1990).

28. 357 N.E.2d 738 (Ind. Ct. App. 1976).

29. 127 Cal. Rptr. 745 (Cal. Ct. App. 1976).

30. *Kochin v. Eaton Corp.*, 797 F. Supp. 679, 685 (N.D. Ind. 1992).

The *Kochin* court also addressed whether a subjective or objective standard should be applied to determine whether the bystander incurred the risk.³¹ Although not handed down by the time the jury returned a verdict, *Kochin* recognized that the Indiana Supreme Court, in *Koske v. Townsend Engineering Co.*,³² decided that the evaluation of the product user's conduct is to be judged by a subjective rather than objective standard.³³ Accordingly, plaintiff-bystanders in product liability actions may assume the risk of injury. Moreover, whether the bystander assumed the risk of the defective product will be judged by the bystander's own perception of the risk involved.

III. EXTENT OF SELLER'S DUTY TO WARN

In *York v. Union Carbide Corp.*,³⁴ the Indiana Court of Appeals for the Third District discussed the extent of a manufacturer's duty to warn a buyer of the dangerous propensities of argon gas.³⁵ Specifically, this decision responds to an argument from the widow of a Union Carbide employee that Union Carbide was required to personally inform the decedent, as opposed to merely warning his supervisors, of the dangers of argon gas.³⁶

After deciding that the argon gas was not a defective product as defined by the Indiana Product Liability Act,³⁷ the court recognized that the only manner in which argon could have been defective in this case, under Indiana's product liability law, was under the provision for a manufacturer's failure to warn, Indiana Code section 33-1-1.5-2.5(b).³⁸ In an action based upon a negligent failure to warn, when the warnings are given to an employer (or other third parties), the court said, "the question remains whether this method gives a reasonable assurance that the information will reach those whose safety depends upon their having it."³⁹ Thus, "adequacy of warnings remains at issue, and Union Carbide could still be found liable if it provided inadequate warnings to those

31. *Id.*

32. 551 N.E.2d 437 (Ind. 1990).

33. *Kochin*, 797 F. Supp. at 685.

34. 586 N.E.2d 861 (Ind. Ct. App. 1992).

35. *Id.*

36. *Id.* at 867.

37. *Id.* (The argon gas would have been defective under the Act if in a "condition not contemplated by reasonable persons among those considered expected users or consumers" of the product, or if it was "unreasonably dangerous to the expected user or consumer when used in reasonably expected ways or handling or consumption.")

38. *Id.* at 868.

39. *Id.* at 869 (quoting RESTATEMENT (SECOND) OF TORTS § 388 cmt. n (1965)).

USX personnel responsible for receiving the product and disseminating the information to the co-workers.”⁴⁰

The court in *York* held that Union Carbide gave an adequate warning to the buyer of the dangerous properties of argon gas. It reasoned that, because the buyer had a great deal of information concerning the effect of argon gas in a confined space, no additional warning or literature that could be furnished by Union Carbide to the buyer could have improved the buyer’s understanding of the characteristics of the product.⁴¹ Thus, said the court, the plaintiff did not raise a material issue of fact, and, for this reason, it must be concluded that the warnings were adequate as a matter of law.⁴²

The court in *York* also addressed plaintiff’s argument that Union Carbide had a duty to train the employees of the buyer on the proper method of testing a confined space for oxygen deficiency.⁴³ The plaintiff’s argument found its source in Indiana Code section 33-1-1.5-2.5(b)(2), which contains the requirement that the manufacturer give “reasonably complete instructions on the proper use of the product.”⁴⁴

The court, however, rejected the plaintiff’s argument that Union Carbide had a duty to train the employees of the buyer. In doing so, the court found important the fact that the plaintiff offered no authority for the proposition that a manufacturer has a legal duty to train the employees of its buyer.⁴⁵

IV. OPEN AND OBVIOUS DANGER

In *Phillips v. Cameron Tool Corp.*,⁴⁶ the Court of Appeals for the Seventh Circuit addressed whether the trial court’s open and obvious danger instruction was correct.⁴⁷ In doing so, the court recognized that intervening events since the trial had caused the trial court’s instruction to be erroneous, although correct when given.

The Seventh Circuit in *Phillips* relied upon the Indiana Supreme Court decision in *Bemis Co. v. Rubush*,⁴⁸ which had concluded that a product was not unreasonably dangerous, and therefore no warnings were required if, objectively viewed, the dangers were open and obvious.⁴⁹

40. *Id.*

41. *Id.* at 872.

42. *Id.*

43. *Id.* at 871.

44. *Id.*

45. *Id.*

46. 950 F.2d 488 (7th Cir. 1991).

47. *Id.*

48. 427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982).

49. *Id.* at 1061.

In fact, the trial court in *Phillips* gave a *Bemis* instruction.⁵⁰ Subsequent to the trial, the Indiana Supreme Court decided *Koske v. Townsend Engineering Co.*,⁵¹ *FMC Corp. v. Brown*,⁵² and *Miller v. Todd*.⁵³

Noting that the injuries in *Bemis* occurred before the 1978 adoption of the Indiana Product Liability Act, the court in *Koske* concluded that under the Act, an open and obvious danger does not necessarily negate liability although it bears upon the manufacturer's expectations of potential use and upon a user's subjective appreciation of the risk and his voluntary acceptance of it.⁵⁴ In *FMC Corp.*, the court noted that feasible safeguards, not adopted, may cause a product having an open and obvious danger to be unreasonably dangerous and therefore defective.⁵⁵ In a different context, the court in *Miller* further developed this concept.⁵⁶

The plaintiff in *Phillips*, the operator of an industrial die press, brought a strict liability action claiming, among other things:

that the die was defectively designed because the lifting devices should have been an inherent part of the die, the die should have had safety devices to hold the shoes together when moved about the plant, and the die should have been designed with instructions and warnings concerning the use of proper size bolts and/or safety devices to transport the die.⁵⁷

Defendant's response included the contention that the alleged defects were open and obvious.⁵⁸

50. *Phillips*, 950 F.2d at 491. The text of the instruction was as follows: The law does not require a manufacturer to warn of dangers of hazards which are open and obvious in the use of a product or which are personally known to the user. A product is not unreasonably dangerous, and therefore, is not defective, if the danger is open and obvious. The plaintiff must establish a latent, or hidden, danger in order to prove that the product was defective. In determining whether the danger was open and obvious, you may consider both this particular plaintiff's knowledge about the product and the objective knowledge that a reasonable person would possess in circumstances similar to the plaintiff's. If you find that this plaintiff had actual knowledge of the danger or that a reasonable person in circumstances similar to the plaintiff's circumstances would have known of the danger, then the danger is not hidden, and you should find for the defendant. On the other hand, if you find that the plaintiff did not actually know about the danger and that the reasonable person in circumstances similar to the plaintiff's circumstances would not have known about the danger, then you should find the danger was hidden.

51. 551 N.E.2d 437 (Ind. 1990).

52. 551 N.E.2d 444 (Ind. 1990).

53. 551 N.E.2d 1139 (Ind. 1990).

54. *Koske*, 551 N.E.2d at 441-42.

55. *FMC Corp.*, 551 N.E.2d at 446.

56. *Miller*, 551 N.E.2d at 1143.

57. *Phillips v. Cameron Tool Corp.*, 950 F.2d 488, 490 (7th Cir. 1991).

58. *Id.*

Based upon the recent decisions in *Koske*, *FMC Corp.*, and *Miller*, the Seventh Circuit Court of Appeals in *Phillips* reversed the trial court decision and remanded the case for a new trial.⁵⁹ Although the trial court's instruction was correct when given, "the latest decision on an issue of civil law will have a retroactive effect unless it would impair a contract made or vested rights acquired in reliance upon an earlier decision."⁶⁰ For this reason, the Seventh Circuit Court of Appeals instructed the trial court, upon remand, to correct its instruction to be in line with these three latest decisions.⁶¹

V. "STATE OF THE ART"

The Seventh Circuit in *Phillips* also addressed the validity of defendant's state of the art defense.⁶² Specifically, the defendant argued that its die design was the state of the art, and, for this reason, any liability on its part should be negated.⁶³

In response to this defense, the court first recognized that, under Indiana Code section 33-1-1.5-4(b)(4), a defendant may assert a state of the art defense to a strict liability claim.⁶⁴ Because the statute does not define state of the art, the court said that there has been some confusion among courts and commentators about the meaning of the term.⁶⁵ Most theorists considered it as signifying existing technological capability, but some related it to then-existing standards of the industry.⁶⁶ As of November 1989, Indiana had not expressly adopted either standard, although Indiana Pattern Jury Instruction 7.05 had recently cast its lot with the technological capability standard.⁶⁷ Because the law was unsettled, the trial court opted not to define "state of the art," although plaintiff offered an instruction quite similar to the pattern instruction.⁶⁸

A few months after the trial court's decision, the Indiana Court of Appeals, First District, in *Montgomery Ward & Co. v. Gregg*,⁶⁹ expressly rejected the concept of industry practice.⁷⁰ The court in *Montgomery Ward* embraced the concept of technological advancement inherent in

59. *Id.* at 491.

60. *Id.* at 490.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. 554 N.E.2d 1145, 1155 (Ind. Ct. App. 1990).

70. *Id.*

both the pattern instruction and that offered by the plaintiff in *Phillips*.⁷¹ The court in *Phillips* held that allowing the jury to choose between differing legal standards when, as of the decision in *Montgomery Ward*, a single legal standard controlled, was an error which required reversal.⁷²

VI. PRODUCT DEFECT AND FORESEEABLE USE

In *Peters v. Judd Drugs, Inc.*,⁷³ the Indiana Court of Appeals for the Third District was asked to determine whether a bottle of potassium hydroxide, a product unsafe for human consumption, was a "defective product."⁷⁴ The facts relevant to this case disclose that, while the plaintiff was a patient at the Hudson Medical Group, a nurse at Hudson mistakenly retrieved a bottle of potassium hydroxide from the medical supply room rather than the silver nitrate which was used to treat plaintiff's urethritis. Then, without reading the label on the bottle, the nurse instilled the potassium hydroxide solution causing plaintiff to feel an immediate burning sensation.⁷⁵

As a result of this incident, the plaintiff brought a strict liability claim against the pharmacy that supplied the potassium hydroxide to the clinic. She alleged that by packaging the potassium hydroxide in the same manner as medicine sent to Hudson, and by failing to place labels which warned against any use for humans, a genuine issue of material fact existed as to whether the defendant sold a defective product.⁷⁶

In denying plaintiff's strict liability claim, the court recognized, as the threshold question, "whether there [was] 'evidence that the supplier knew or had reason to know that the product was likely to be dangerous when used in a foreseeable manner'."⁷⁷ The evidence disclosed that:

the supplier, Judd, and Hudson employees had no reasonable expectation that the potassium hydroxide would be stored with medicine, would be instilled into a patient, or would be used for any purpose other than [its stated purpose] for the preparation of laboratory materials. Further, it was not foreseeable that a Hudson employee would use the potassium hydroxide without reading the label or the warning.⁷⁸

71. *Id.*

72. *Phillips*, 950 F.2d at 490.

73. 602 N.E.2d 162 (Ind. Ct. App. 1992).

74. *Id.*

75. *Id.* at 163.

76. *Id.*

77. *Id.* at 164-65.

78. *Id.* at 165.

Accordingly, because the product was not used in a manner foreseeable to the supplier, under Indiana law the bottle of potassium hydroxide was not a defective product.

VII. REAL ESTATE IMPROVEMENT AS "PRODUCT"

The Seventh Circuit, in *Sapp v. Morton Buildings, Inc.*,⁷⁹ addressed the threshold question of whether to classify a contract for the installation of a real estate improvement as a "product" under the Indiana Product Liability Act, or as a service to which the Act does not apply.⁸⁰ The facts relevant to this case disclose that, in 1982, the plaintiff, Sapp, contracted with Morton to remodel a barn on Sapp's land. Because the existing barn had nonstandard dimensions, all materials, except the doors and windows, had to be tailor made at the building site to fit the existing structure. This tailoring of the parts included pieces of channel iron nailed to cover the top of exposed boards in the stable to prevent the horses from chewing on the wood. Morton manufactured the channel iron used on this job. The new adjoining stable building was of standard design and therefore was largely prefabricated at one of Morton's plants.⁸¹

One of plaintiff's horses was kept in a stall of the barn remodeled into a stable. In April 1985, this horse suffered a laceration on its lip, which developed into an infection. As a result, the horse had to be destroyed. The plaintiff brought an action alleging that the laceration and resulting infection were caused by the improperly installed and designed piece of channel iron.⁸² To determine whether the Indiana Product Liability Act governed this action, the court found the determining factor to be whether the transaction involved "predominately the sale of a service or a product."⁸³

Although the court could not locate any Indiana cases on point, it held that Morton's remodeling of Sapp's barn involved predominately the sale of a service, rather than a product.⁸⁴ In reaching its decision, the Seventh Circuit found relevant the fact that the materials used to remodel the barn had to be modified "on the job" to custom fit the new stable.⁸⁵ "Thus, in sharp contrast to the prefabricated building also provided by Morton, the remodeled barn required Morton to make

79. 973 F.2d 539 (7th Cir. 1992).

80. *Id.*

81. *Id.* at 540.

82. *Id.*

83. *Id.* (The Act, in defining a "product," draws a crucial distinction between transactions which involve "wholly or predominately the sale of a service rather than a product.")

84. *Id.*

85. *Id.*

numerous and extensive site-specific adjustments to convert the building into a stable.”⁸⁶ The Morton employees did not simply install a pre-fabricated product on Sapp’s property. The court recognized that the employees custom designed and fit their materials to the specifications of the old barn.⁸⁷ Thus, the transaction was primarily a sale of a service.⁸⁸

The court’s conclusion in *Sapp* that Morton’s work was predominantly a provision of a service and not a product is fortified by the analysis in *Grain Dealers Mutual Insurance Co. v. Chief Industries, Inc.*⁸⁹ In *Grain Dealers*, the District Court for the Northern District of Indiana addressed whether the product liability or real estate improvement statute of limitations applied to the design, manufacture, and assembly of a grain storage bin.⁹⁰ The real estate improvement statute, the court reasoned, had never been applied to “actions against entities like the defendant who design fungible products without any particular parcel of real estate in mind and do not participate in the on-site construction of an improvement to real estate.”⁹¹

Contrary to the analysis set forth in *Grain Dealers*, the plaintiff in *Sapp* argued that the channel iron should be considered a product under the Act.⁹² He reasoned that the *Grain Dealers* court observed that “courts in Indiana treat an action against a manufacturer of a product as products liability actions even if the product ultimately becomes a part of an improvement to real estate.”⁹³ In rejecting this contention, the court indicated that it understood *Grain Dealers* to stand for the “sensible proposition that *if an item is a product*, its use in the improvement of a parcel of real estate does not take it out of the Act’s coverage.”⁹⁴ As was already noted, Morton’s remodeling of the Sapp barn was primarily the sale of a service, not a product, and the Act explicitly excludes such transactions from its coverage.⁹⁵ Accordingly, the Product Liability Act should be applied to goods manufactured without any particular parcel of real estate in mind and which are then made part of the improvement to real estate.⁹⁶

86. *Id.* at 542.

87. *Id.*

88. *Id.*

89. 612 F. Supp. 1179 (N.D. Ind. 1985).

90. *Id.* at 1181.

91. *Id.*

92. *Sapp*, 973 F.2d at 542.

93. *Id.*

94. *Id.* at 543.

95. *Id.*

96. *Id.*

VIII. CONCLUSION

The 1992 survey period has witnessed the resolution and clarification of several important issues with respect to the Indiana Product Liability Act. It is now clear that an open and obvious danger does not necessarily negate liability on the part of the manufacturer. Furthermore, courts have been given a working definition of the phrase "state of the art." The applicability of the statute of repose has been limited to product defects existing at the time of delivery to the initial user or consumer. A bystander may assume the risk of injury from a defective product. As evidence that Indiana product liability law is a hybrid of strict liability and negligence principles, the court has said that a product can only be defective while being used or consumed in a manner reasonably foreseeable to the manufacturer. Lastly, the courts have provided substantial guidance on the troubling issue of when an improvement to real estate is a "product."

ARTICLE

Origin, Development, and Current Status of Fiduciary Duties in Close Corporations: Has Indiana Adopted a Strict Good Faith Standard?

JOHN R. VAN WINKLE*

GARY R. WELSH**

INTRODUCTION

Indiana, like the majority of other jurisdictions, has long recognized that directors and officers of corporations owe certain fiduciary duties to others in the corporation. The general common law rule, applicable to private corporations of all sizes, requires corporate directors and officers to conduct themselves and discharge their duties fairly, honestly, and openly.¹ Although not technically considered trustees, corporate directors were held by courts in equity to stand in a fiduciary relationship to the corporate entity and to the shareholders.²

In many jurisdictions, courts and legislatures have differentiated public and widely held corporations from close corporations, imposing more stringent fiduciary duties on directors and shareholders of close corporations.³ Analogizing close corporations to partnerships and joint ventures, these courts and legislative bodies reason that the nature of the relationship generally existing between shareholders and directors in close corporations justifies or mandates a higher standard of duty.

To preserve and protect the principles of corporate democracy and majority governance, those courts applying a strict good faith test also tend to establish a burden-shifting and balancing test. When the majority

* Partner, Bingham Summers Welsh & Spilman, Indianapolis; B.A., 1966, Butler University; J.D., 1970, Indiana School of Law—Indianapolis.

** B.A., 1984, Eastern Illinois University; J.D., 1993, Indiana University School of Law—Indianapolis.

1. See *Hartung v. Architects Hartung/Odle/Burke, Inc.*, 301 N.E.2d 240 (Ind. Ct. App. 1973) (citing *Hill v. Nisbet*, 100 Ind. 341 (1885)); see also *Helms v. Duckworth*, 249 F.2d 482 (D.C. Cir. 1957).

2. See 1A WILLIAM M. FLETCHER, *CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 838, at 177 (Rev. ed. 1983) (Supp. 1991).

3. See generally F. HODGE O'NEAL & ROBERT B. THOMPSON, *O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS* (2d ed. 1991); Henry F. Johnson, *Strict Fiduciary Duty in Close Corporations: A Concept in Search of Adoption*, 18 CAL. W. L. REV. 1 (1981); Charles W. Murdock, *The Evaluation of Effective Remedies for Minority Shareholders and Its Impact upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425 (1990); Ralph A. Peeples, *The Use and Misuse of the Business Judgment Rule in the Close Corporation*, 60 NOTRE DAME L. REV. 456 (1985).

or controlling group of shareholders face a claim of breach of fiduciary duty, courts require them to establish a legitimate business purpose for their action.⁴ In turn, minority shareholders must demonstrate that the majority could have achieved this legitimate objective by an alternative course of action less harmful to the minority.⁵

One may argue that the Indiana Court of Appeals in *W & W Equipment Co., Inc. v. Mink*⁶ implicitly adopted a strict good faith standard, applying a burden-shifting and balancing test. If in fact adopted, a strict good faith standard would clarify the status of the law in Indiana and a more specific standard will be available to determine when, and under what circumstances, a breach of fiduciary duty occurs.

The purpose of this Article is to describe the origin, development, and current status of the law in Indiana regarding fiduciary duties in close corporations. Additionally, it will assert that Indiana implicitly has adopted a strict good-faith standard, as well as a burden-shifting and balancing test. Part I explores the origins of the fiduciary duty in close corporations. Part II discusses the relationship of shareholders in close corporations as an "incorporated partnership," a concept Indiana courts have adopted. Part III maintains that Indiana implicitly has adopted a strict good faith standard of care that shareholders in close corporations owe to other shareholders. Part IV discusses the various contexts in which Indiana courts have found a fiduciary duty. Finally, Part V discusses procedural issues and damage questions relevant to breach of fiduciary duty claims.

I. ORIGINS OF FIDUCIARY DUTY

The law of trusts forms the basis for fiduciary duties. Early common law definitions stated that a "fiduciary" is "a person holding the character of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor with which it requires."⁷ Stated in more general terms, a "fiduciary" is "a person having a duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking."⁸ Fiduciaries in a corporation, however, are not trustees in the strict sense of the term because they do not have title to the estate. Rather, they are fiduciaries because they control the corporation's property.⁹

4. See, e.g., *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (Mass. 1976); *Donahue v. Rodd Electrotpe Co.*, 328 N.E.2d 505, 511 (Mass. 1975).

5. *Wilkes*, 353 N.E.2d at 663.

6. 568 N.E.2d 564 (Ind. Ct. App. 1991).

7. BLACK'S LAW DICTIONARY 563 (5th ed. 1979).

8. *Id.*

9. 18 PAUL J. GALANTI, INDIANA PRACTICE ON BUSINESS ORGANIZATIONS § 25.10, at 705 (1991).

The United States Supreme Court, in a leading case of *Pepper v. Litton*,¹⁰ applied common law fiduciary principles by analogy to explain the appropriate rules of conduct for the directors of a corporation vis-a-vis the corporate entity and the shareholders.¹¹ Justice Douglas, speaking for the Court, detailed a frequently cited code of conduct for the corporate fiduciary:

He who is in such a fiduciary position cannot serve himself first and his cestuis second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation.¹²

Determining that a person is a fiduciary gives direction to further inquiry: To whom is the person a fiduciary? What are that person's obligations? How has that person failed to discharge those obligations? What are the consequences of the fiduciary's deviation from that duty?¹³ The common law has long recognized that directors and officers of corporations are in a fiduciary relationship with the corporation and its shareholders.¹⁴ The director's duty to the corporation and its shareholders is one of complete loyalty, honesty, and good faith.¹⁵ As a fiduciary, "a director's first duty is to act in all things of trust wholly for the benefit of the corporation."¹⁶ This includes a duty to disclose information

10. 308 U.S. 295 (1939).

11. *Id.* at 311.

12. *Id.*

13. *SEC v. Chenery*, 318 U.S. 80, 85-86 (1943).

14. *See* 1A *FLETCHER*, *supra* note 2, at 177.

15. *Id.*

16. *Id.* at 178.

to those who have a right to know the facts.¹⁷ A director is not ordinarily liable for the misconduct of a codirector. However, a director is liable for the misconduct when he or she actually participates in the wrongdoing, or when he or she learns of a codirector's misdeeds and either fails to take action or acquiesces.¹⁸ A director is under a duty to disclose the misconduct of the codirector to the other directors to avoid liability for the acquiescence.¹⁹

Dominant or controlling shareholders in a corporation have a fiduciary obligation to the corporation and other shareholders similar to that of directors. Courts subject their dealings with the corporation to rigorous scrutiny.²⁰ Whenever other shareholders challenge their conduct, the controlling shareholders bear the burden of proving that the corporation conducted the transaction in good faith and with fairness.²¹ The basic test is "whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain."²²

Thus, under the traditional standards of corporate fiduciary duty, the minority shareholder in either a public or a close corporation has the legal right to initiate a suit against the majority shareholders and directors, if the majority shareholders and/or directors engaged in self-serving conduct.²³ In practice, however, corporate offenders traditionally have been protected by two very important corporate principles: (1) the business judgment rule, and (2) the principle of majority control.²⁴ Because of these rules, courts traditionally have been reluctant to interfere in the internal affairs of a corporation. An early Indiana Supreme Court decision evidences such reluctance:

It is the policy of the law to leave corporate affairs to the control of the corporate agencies, and the courts are not warranted at the suit of minority stockholders in interfering with the management of such agencies, even though it may be unwise, and may result in loss, except in a plain case of fraud, breach of trust, or such maladministration as works a manifest wrong to them.²⁵

17. *Id.*

18. *Dotlich v. Dotlich*, 475 N.E.2d 331, 343 (Ind. Ct. App. 1985).

19. *Id.*

20. *Pepper v. Litton*, 308 U.S. 295 (1939).

21. *Id.*

22. *Id.* at 306-07.

23. *Donahue v. Rodd Electrotypes Co.*, 328 N.E.2d 505, 513 (Mass. 1975).

24. 1 O'NEAL & THOMPSON, *supra* note 3, § 3:03, at 4.

25. *Raff v. Darrow*, 111 N.E. 189, 191 (Ind. 1916).

II. APPLICATION OF PARTNERSHIP PRINCIPLES TO CLOSE CORPORATIONS

Historically, courts have had little difficulty applying the principles of corporate democracy to large, widely held corporations. When dealing with close corporations, however, courts wrestled with the different expectations and relationships, as well as the extent to which the participants depended upon the close corporation for their livelihood. The application of principles of strict majority control to close corporations collided with these factors and many perceived that the results were unfair to minority interests. In Judge Cardozo's opinion in *Meinhard v. Salmon*,²⁶ courts found a legal justification for not applying strict corporate democracy principles to close corporations. In that case, Cardozo applied the strict fiduciary standards applicable to partnerships to joint adventurers. He stated:

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attribute of courts of equity when petitioned by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.²⁷

Following Cardozo's analogy to its logical conclusion, other courts began to apply the same fiduciary principles to directors and shareholders in close corporations. In one of the earliest of such decisions, *Helms v. Duckworth*,²⁸ Judge Burger declared that "stockholders of a close corporation occupy a position similar to that of joint adventurers and partners."²⁹ The court in *Helms* held that shareholders in close corporations "bear a fiduciary duty to deal fairly, honestly and openly with their fellow shareholders and to make disclosure of all essential

26. 164 N.E. 545 (N.Y. 1928) (Cardozo, J.).

27. *Id.* at 546.

28. 249 F.2d 482 (D.C. Cir. 1957) (Burger, J.).

29. *Id.* at 486.

information.”³⁰ In adopting a higher standard, the court explained that the traditional view, which held that shareholders of corporations did not bear a relation of trust and confidence to one another, “ignore[d] the practical realities” of a close corporation in which “the stockholders, directors, and managers are the same persons,” and in which there is a lack of division between the ownership and management.³¹

In 1975 the Supreme Court of Massachusetts, prompted by *Helms*, decided *Donahue v. Rodd Electrotape Co.*,³² which imposed a fiduciary duty similar to that owed by partners on close corporation shareholders. In *Donahue*, a close corporation entered into an agreement with a former officer and director to repurchase his shares.³³ Donahue, a minority shareholder, objected and offered to sell her shares to the corporation for the same price and on the same terms as those given the former directors. However, the corporation refused the offer.³⁴ Donahue sued the majority shareholders, claiming that the repurchase agreement violated a fiduciary duty owed to her by the majority shareholders. The trial court dismissed her complaint, but the Supreme Judicial Court of Massachusetts reversed.³⁵ The court decided that Donahue’s complaint stated a claim for breach of fiduciary duty, and considered the case in the narrow context of a close corporation.³⁶ The court reasoned that close corporations required distinct judicial treatment:

Because of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority interests in the close corporation, we hold that stockholders in the close corporation give one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another.³⁷

The court in *Donahue* adopted a more stringent standard in close corporations, stating: “[S]tockholders in close corporations must discharge their management and stockholder responsibilities in conformity with [a] *strict good faith standard*.”³⁸ To underscore the fact that the court was establishing a higher standard for shareholders in close cor-

30. *Id.* at 487.

31. *Id.* at 486.

32. 328 N.E.2d 505 (Mass. 1975).

33. *Id.* at 510.

34. *Id.* at 511.

35. *Id.* at 521.

36. *Id.* at 511.

37. *Id.* at 515.

38. *Id.* (emphasis added).

porations, the court said: "We contrast this strict good faith standard with the somewhat less stringent standard of fiduciary duty to which directors and stockholders of all corporations must adhere in the discharge of their corporate responsibilities."³⁹

In this case, the repurchase agreement provided a single stockholder with a ready market for his shares and operated as a "preferential distribution of assets."⁴⁰ Thus, the court in *Donahue* concluded that the strict good faith standard in a close corporation required the controlling shareholders selling stock to the corporation "to offer to each stockholder an equal opportunity to sell a ratable number of shares to the corporation at an identical price."⁴¹

A year following the *Donahue* decision, the Massachusetts court tempered its holding out of a concern that the unrestricted use of the strict good faith standard might impinge unduly upon the majority's legitimate right to control the corporate activities.⁴² The court in *Wilkes v. Springside Nursing Home, Inc.*⁴³ imposed a two-step analysis upon the strict good faith standard, establishing a burden-shifting process and a balancing test.⁴⁴ One commentator explained the *Wilkes* analysis as follows:

First, the majority must demonstrate a legitimate business purpose for the offending action. If the majority shareholder advances either no purpose or an unsatisfactory purpose, the complaining shareholders are entitled to relief. If a legitimate business purpose is advanced, the complaining shareholders may demonstrate that the legitimate business purpose "could have been achieved through an alternative course of action less harmful to the minority's interest." The court must then "weigh the legitimate business purpose, if any, against the practicability of the less harmful alternative."⁴⁵

Thus, when a minority shareholder brings an action for breach of fiduciary duty, the court under the *Wilkes* approach will focus on whether the majority shareholders can establish that their action served a legitimate business purpose. The inquiry does not end there. If the majority shareholders can demonstrate a legitimate business purpose, the *Wilkes* ap-

39. *Id.* at 515-16.

40. *Id.* at 519.

41. *Id.* at 518.

42. *See Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (Mass. 1976).

See also Peeples, *supra* note 3, at 498-501.

43. 353 N.E.2d 657 (Mass. 1976).

44. *Id.* at 663.

45. Peeples, *supra* note 3, at 498.

proach then affords the complaining minority shareholders an opportunity to show that the same business purpose could have been achieved via a less harmful alternative.

In *Wilkes*, four partners had formed a corporation to operate a nursing home, each owning an equal number of shares. At the time of incorporation, the partners intended that each would be a director and participate actively in the management of the nursing home. The partners also agreed that the corporation would pay each an equal salary as long as each assumed an active and ongoing responsibility in operating the business. When one of the partners became unable to perform his responsibilities due to health reasons, he sold his shares to a local banker who assumed responsibility for the financial management of the business. The banker also received an equal salary.

Later, relations between Wilkes and the other shareholders deteriorated as a result of differences over a property transaction. Wilkes gave notice to the other shareholders of his intention to sell his shares. However, Wilkes continued to fulfill his management responsibilities. Upon learning of Wilkes' intentions, the other shareholders, acting as directors, removed Wilkes as a director and officer. They informed him that his services were no longer needed.

The court in *Wilkes* reversed a lower court decision in favor of the majority shareholders on Wilkes' breach of fiduciary duty claim. The court held that the majority shareholders failed to meet their burden of showing a legitimate business purpose for removing Wilkes from the payroll of the corporation, which had never paid dividends.⁴⁶ Likewise, they failed to show a legitimate business purpose for refusing to reelect him as a salaried officer and director of the corporation.⁴⁷ The court said:

[I]t is an inescapable conclusion from all the evidence that the action of the majority stockholders here was a designed 'freeze out' for which no legitimate business purpose has been suggested. . . . We may infer that a design to pressure Wilkes into selling his shares to the corporation at a price below their value well may have been at the heart of the majority's plan.⁴⁸

Courts have not uniformly adopted the strict good faith standard articulated in *Donahue* and *Wilkes*. As one commentator observed: "It is disappointing to note that the *Donahue* standard has not been more

46. *Wilkes*, 353 N.E.2d at 663-64.

47. *Id.*

48. *Id.* at 664.

widely accepted. A strict standard of fiduciary duty should clearly apply to close corporations due to their unique character.”⁴⁹

III. HAS INDIANA ADOPTED A STRICT GOOD FAITH STANDARD?

A review of Indiana cases discussing the standard that courts should employ is necessary to determine if Indiana has adopted the strict good faith standard. As early as 1973, two years before the Supreme Court of Massachusetts decided *Donahue*, Indiana courts began treating close corporations as incorporated partnerships, as suggested by Justice Burger in *Helms*. As a result, these courts imposed a higher fiduciary duty upon the shareholders in close corporations.⁵⁰ In *Hartung v. Architects Hartung/Odle/Burke, Inc.*,⁵¹ the First District Court of Appeals became the first court in Indiana to adopt the “incorporated partnership” concept. *Hartung* involved a close corporation comprised of only three shareholders, who also served as officers and directors. The shareholders signed promissory notes personally guaranteeing a loan, which the corporation executed in order to pay salaries and operating expenses. Hartung, the president, resigned as an officer and director after discord arose among the shareholders. The corporation later defaulted on the loan and Hartung refused to make good on his promise when the bank demanded repayment from the shareholders, leaving the other two shareholders responsible for the debt. In addition, Hartung leased the corporation’s premises for his personal business behind the backs of the other two shareholders. He also began luring away corporate clients.

The aggrieved shareholders sued Hartung for breach of fiduciary duty and for contribution for his share of the loan debt. In affirming the trial court’s judgment in favor of the aggrieved shareholders, the court in *Hartung* held that “shareholders in a close corporation, also referred to as an ‘incorporated partnership,’ stand in a fiduciary relationship to each other.”⁵² Describing the fiduciary duty of a director, officer, or shareholder as being “the same regardless of the capacity in which it arises,”⁵³ the court asserted: “The fiduciary must deal fairly, honestly and openly with his corporation and fellow stockholders . . . [and] must not be distracted from the performance of his official duties by personal interests.”⁵⁴ The court in *Hartung* relied upon the *Helms*

49. Johnson, *supra* note 3, at 21.

50. *Id.*

51. 301 N.E.2d 240 (Ind. Ct. App. 1973).

52. *Id.* at 243.

53. *Id.*

54. *Id.* (citing *Helms v. Duckworth*, 249 F.2d 482 (D.C. Cir. 1957)).

decision in support of its characterization of a close corporation as an "incorporated partnership."⁵⁵

Although a line of Indiana decisions following the *Hartung* decision recognized the higher duty shareholders in a close corporation owe to one another, none of the decisions directly applied a strict good faith standard.⁵⁶ In one of those cases, *Cressy v. Shannon Continental Corp.*,⁵⁷ the court of appeals refined the relationship of shareholders in close corporations, holding that the term "incorporated partnership" meant that this form of business enterprise was a hybrid.⁵⁸ The court stated:

While parties incorporate to obtain the benefits of limited liability, perpetual existence of business entity or tax considerations accruing to the corporate form, they often expect to act and to be treated as partners in their dealings among themselves. When this intention is manifest and no harm results to outsiders thereby, there appears little reason to frustrate the parties' actual intent by strict adherence to the traditional norms of corporate law.⁵⁹

Under *Cressy*, if the parties in a close corporation *intended* or *expected* to be treated as partners, the court would honor these intentions and expectations even though it required a departure from traditional corporate governance.

In another important case, *Scott v. Anderson Newspapers, Inc.*,⁶⁰ the Fourth District Court of Appeals upheld the expectations and intentions of the parties and reached a fundamentally different result than the court would have reached had it applied traditional corporate principles. The court in *Scott* went to great lengths to protect and uphold the expectations of the parties and the rights of minority shareholders. The case involved a close corporation, Anderson Newspapers (ANI), which was formed when two smaller corporations, Bulletin Printing and Manufacturing Co. and the Herald Publishing Co., consolidated under Indiana statutory law.⁶¹ Prior to the consolidation, each company had separately operated different newspapers. In their agreement to incor-

55. *Id.*

56. See, e.g., *Krukemeier v. Krukemeier Mach. & Tool Co., Inc.*, 551 N.E.2d 885, 888 (Ind. Ct. App. 1990); *Ross v. Tavel*, 418 N.E.2d 297, 304 (Ind. Ct. App. 1981); *Motor Dispatch, Inc. v. Buggie*, 379 N.E.2d 543, 547 (Ind. Ct. App. 1978); *Cressy v. Shannon Continental Corp.*, 378 N.E.2d 941, 945 (Ind. Ct. App. 1978).

57. 378 N.E.2d 941 (Ind. App. 1978).

58. *Id.* at 945.

59. *Id.*

60. 477 N.E.2d 553 (Ind. Ct. App. 1985). For further discussion, see 19 GALANTI, *supra* note 9, at 195-96.

61. *Scott*, 477 N.E.2d at 558.

porate, the parties stipulated that each newspaper would continue to be printed, published, and distributed as before the consolidation. The agreement also stated that neither paper would interfere or restrict the rights of the other in respect thereto. The agreement further provided that the shareholders represented by the Bulletin group would elect a majority of the directors, and the shareholders represented by the Herald group would elect a minority of the directors. Under the agreement, neither Bulletin or Herald shareholders in the new corporation could nominate or vote upon the directors of the other group, nor could their directors participate in the conduct of the other's affairs. The majority directors elected the president and secretary of the corporation and the minority directors elected the vice president.

Both parties complied with the agreement through the first thirty years of the corporation. In 1981, John Scott, the vice president of ANI and the founder of the Herald, died. After Scott's death, his son voluntarily assumed the position of editor of the Herald and earned the same salary as his father had earned. The Bulletin group and its directors decided to exercise control over all of ANI's affairs, including the nomination and election of the Herald group's vice president, its three directors, and the appointment of the Herald's editor. The majority amended the articles of consolidation and the by-laws to provide that ANI's stockholders or its directors could transact all corporate business by a simple majority vote. The changes effectively cut off the Herald group's right to publish the Herald.

The Herald group's directors obtained a favorable declaratory judgment from the trial court.⁶² On appeal, the Bulletin group's shareholders argued that Indiana's corporations statute permitted a simple majority vote to amend the articles to eliminate the original consolidation agreement.⁶³ In affirming the trial court's judgment, the court of appeals treated the question as a matter of contract law.⁶⁴ Because the articles clearly expressed the intent of the parties that the Bulletin group should control the Bulletin's affairs exclusively and that the Herald group should control the Herald's affairs exclusively, the court held the agreement enforceable, even though it was totally contrary to the basic corporate principle of majority governance.⁶⁵ The court declared that the "intent is the supreme mandate governing the conduct of ANI's business and affairs."⁶⁶ Construing Indiana's corporation statute, the court held that such restrictions and rights are valid in states such as Indiana which

62. *Id.* at 556.

63. *Id.* at 560.

64. *Id.* at 559-62.

65. *Id.* at 560.

66. *Id.*

permit them to set out such restrictions in the charter rather than in a statute.⁶⁷ The court regarded the articles of consolidation as the controlling document. The basis for the ruling in *Scott*, although stated in terms of expectations, is consistent with the fiduciary relationship approach courts took both in *Hartung* and in *Cressy*.⁶⁸

The Indiana Supreme Court has never directly addressed the precise standard courts must use in breach of fiduciary duty cases. However, in a 1977 decision, *Gabhart v. Gabhart*,⁶⁹ the court indicated a willingness to supply an equitable remedy for an aggrieved shareholder in a close corporation. In *Gabhart*, the majority shareholders effected a merger for a close corporation without a sound business reason for doing so. That merger resulted in the minority shareholder's elimination from the surviving corporation. The court in *Gabhart* decided that a minority shareholder in a close corporation could seek the equitable protection of Indiana's voluntary dissolution statute, rather than being limited to the statutory appraisal procedure.⁷⁰

The court in *Gabhart* termed a merger that is effected for no valid business purpose, and which results in the elimination of a minority shareholder, as a "freeze-out" or a "squeeze-out."⁷¹ The court defined a "freeze-out" or a "squeeze-out" as:

[T]he use of corporate control vested in the statutory majority of shareholders or the board of directors to eliminate the minority shareholders from the enterprise or to reduce to relative insignificance their voting power or claims on corporate assets Furthermore, it implies a *purpose* to force upon the minority shareholder a change which is not incident to any other business goal of the corporation.⁷²

The court in *Gabhart* observed that a "freeze-out" transaction may vary and is *not* limited to a merger or to consolidation disputes.⁷³ In deciding whether a transaction requires an equitable remedy, the court said it must recognize "conflicting policies consistent with the general goals of maximum shareholders benefit and equality of treatment."⁷⁴ Taking a view somewhat similar to the court in *Wilkes*, the supreme

67. *Id.*

68. 19 GALANTI, *supra* note 9, § 31.5, at 196.

69. 370 N.E.2d 345 (Ind. 1977).

70. *Id.* at 356. See IND. CODE §§ 23-1-45-1 to -7 (1988 & Supp. 1992) (voluntary dissolution statute); *id.* §§ 23-1-40-1 to -7 (1988) (statutory appraisal procedure).

71. *Gabhart*, 370 N.E.2d at 353.

72. *Id.* (citation omitted).

73. *Id.*

74. *Id.*

court suggested that it could best handle this problem by adopting a balancing approach. The court noted: "On the one hand is the necessity to provide adequate protection for the interests and expectations of minority shareholders, and the other is the necessity of allowing sufficient corporate flexibility, as is required by modern commerce."⁷⁵

Though the court specifically avoided addressing the question of whether a "freeze-out" transaction conducted by the majority shareholders constituted a breach of fiduciary duty,⁷⁶ the decision in *W & W Equip. Co. v. Mink*⁷⁷ is instructive on this question. The court in *Mink* emphatically declared that *Gabhart* does not say "that Indiana does not recognize freeze-out transactions as a breach of fiduciary duty."⁷⁸

A review of the facts of the *Mink* case is instructive. The case involved a dispute between two shareholders of a small corporation over whether the retiring shareholder or a relatively new shareholder would enjoy the benefits of the corporation's assets. Two individuals, Winter and Wraight, initially formed the W & W Equipment Co. as a partnership engaged in serving as manufacturers' representatives for waste water treatment equipment. Later, the partners incorporated the business. After Wraight began contemplating retirement, the partners brought Mink into the business as a younger partner to replace Wraight. Mink became a twenty percent shareholder in a new corporation. The shareholders acted as both officers and board members of the corporation. The corporation paid salaries to the shareholders in lieu of dividends.

Eventually, Wraight retired and in 1984 moved to California. Winter and Mink each became fifty percent shareholders in the corporation. The succeeding partners paid Wraight book value for his stock in the corporation. Wraight then left the payroll. However, Wraight remained a board member to protect his interest in a loan made by the old corporation to capitalize the new corporation. Secrest, the corporation's legal counsel, served as a fourth member of the board.

A couple of years later, Winter announced that he would retire. Based upon Winter's announcement, the corporation formed a joint venture with another company. However, a dispute arose when Winter demanded half of the value of the corporation for his stock as a condition to his retirement, rather than the book value as had been paid for Wraight's stock. During the negotiations, Winter threatened to remove Mink from the business unless Mink agreed to his demand. When Mink failed to agree, Wraight successfully conspired with the other board

75. *Id.* at 353-54.

76. *Id.* at 356.

77. 568 N.E.2d 564 (Ind. Ct. App. 1991).

78. *Id.* at 575.

members to remove Mink as a director and an officer of the corporation. This action also led to the termination of the joint venture. Mink immediately filed suit against the other board members, seeking compensatory damages for breach of fiduciary duty and dissolution of the corporation. After a bench trial, the court awarded judgment to Mink.⁷⁹ The First District Court of Appeals affirmed the judgment.⁸⁰

On appeal, the defendant board members argued under *Gabhart* that Indiana does not recognize a cause of action for breach of fiduciary duty based upon a "freeze-out" theory.⁸¹ The *Mink* court disagreed with the defendants. The court observed: "Although the court indicated it did not believe the judiciary should intrude into corporate management to the extent of reviewing every proposed merger for fairness to minority shareholders, it did not say . . . that Indiana does not recognize freeze-out transactions as a breach of fiduciary duty."⁸² The court in *Mink* added that the *Gabhart* decision had specifically excepted plain cases of "fraud, *breach of trust*, or such maladministration as works a manifest wrong to the shareholders."⁸³

As much as *Mink* represents a strong commitment to the concerns of minority shareholders in close corporations, at least one commentator prior to this decision believed Indiana courts were backing away from this commitment.⁸⁴ The 1990 First District Court of Appeals decision in *Krukemeier v. Krukemeier Machine & Tool Co.*⁸⁵ supports this proposition. In *Krukemeier*, the complaining shareholder claimed the controlling shareholders breached a fiduciary duty by receiving excessive compensation. Though the court accepted the *Hartung* characterization of close corporations as "incorporated partnerships," the court placed the burden of proving that the compensation was unreasonable upon the complaining shareholder. The court simply held that the term "incorporated partnership" referred only to the fiduciary duty that shareholders in close corporations owe to one another, and that it did not refer to the standard of proof.⁸⁶ Here, the complaining shareholder failed to meet his burden merely by showing that the compensation of the controlling shareholders increased at a time when his dividends had decreased. On the facts of this case, however, it is unlikely the minority shareholder would have prevailed even if the court had placed the burden

79. *Id.* at 569.

80. *Id.* at 578.

81. *Id.* at 574.

82. *Id.* at 575.

83. *Id.* (emphasis added).

84. See 19 GALANTI, *supra* note 9, at 196-99.

85. 551 N.E.2d 885 (Ind. Ct. App. 1990).

86. *Id.* at 888.

upon them.⁸⁷ In view of the *Mink* decision, any reading of *Krukemeier* that suggests that Indiana courts are backing away from a commitment to protect minority shareholders through the imposition of a stricter fiduciary duty appears unsupportable.

Although no Indiana court has expressly adopted either *Donahue*'s strict good faith standard, or the two-step burden-shifting and balancing analysis adopted in *Wilkes*, arguably the Indiana courts implicitly have adopted both. The *Donahue* and *Hartung* decisions, which adopted the "incorporated partnership" concept, both relied upon the *Helms* decision in recognizing a stricter fiduciary duty for shareholders in close corporations. Unless courts impose a higher standard on close corporation shareholders, no legal reason exists to differentiate close corporations from widely held corporations. If courts treat shareholders in close corporations as partners, the fiduciary duty arising from this relationship is no different than the ordinary duty owed by a corporate fiduciary; hence, their designation as partners is without effect.

The court in *Mink* relied on the *Wilkes* decision for the proposition that termination of employment of a minority shareholder can, under the appropriate circumstances, constitute a breach of fiduciary duty.⁸⁸ *Mink*, citing an earlier Indiana decision, also applied a burden-shifting test in determining whether the majority shareholders breached a fiduciary duty owed to the minority shareholder. The court in *Mink* observed that "[o]nce it is established that one with a fiduciary duty has attempted to benefit from a questioned transaction, the law presumes fraud. The burden of proof then shifts to the fiduciary to overcome the presumption by showing his actions were honest and in good faith."⁸⁹ The court's adoption in *Mink* of the *Wilkes* standard of employment and burden-shifting, along with the balancing approach taken in *Gabhart*, and the general language used in many Indiana decisions, support the position that Indiana courts have adopted the strict good faith standard.

IV. THE SCOPE OF THE DUTY IN INDIANA IS BROAD

Regardless of whether Indiana has adopted the strict good faith standard, numerous Indiana cases demonstrate that shareholders in close corporations stand in a fiduciary relationship to one another. Moreover, these cases demonstrate that the scope of that fiduciary duty is broad

87. The evidence showed that the defendant shareholders had been under-compensated, and that the increased pay was justified even if it meant that there were less funds available to pay dividends to the complaining shareholder. *Id.*

88. *W & W Equip. Co. v. Mink*, 568 N.E.2d 564, 574 (Ind. Ct. App. 1991).

89. *Id.* at 573 (quoting *Dotlich v. Dotlich*, 475 N.E.2d 331, 342 (Ind. Ct. App. 1985)).

enough to encompass a variety of transactions, including compensation, corporate opportunity, employment, sale of shares, misappropriation of corporate assets, mergers, and declaration of dividends.

A. Compensation

Shareholders in a close corporation commonly are employees of the corporation. Minority shareholders often disagree with the compensation decisions the majority shareholders make concerning their own compensation. Until recently, the board of directors made all compensation decisions at their discretion. *Green v. Felton*,⁹⁰ an early Indiana decision, illustrates this hands-off approach. In *Green*, minority shareholders challenged as excessive the compensation that the corporation had paid to majority shareholders as officers and directors. The majority shareholders, who had received the challenged compensation, participated as directors in approving their own compensation. In upholding the compensation, the court deferred to the business judgment of the board of directors by noting that "to give the court authority to set aside the action of majority shareholders or board of directors, legally acting under the rules of the company, legally adopted, there must appear injustice or oppression, or circumstances amounting to fraud."⁹¹

Today, Indiana courts are more willing to intercede in corporate decisionmaking in those instances in which the majority shareholders appropriate the profits of the corporation for their own personal use to the detriment of the minority shareholders.⁹² Unlike other self-dealing transactions, in cases of compensation, the burden does *not* shift to the majority shareholders to prove that the compensation is reasonable under Indiana case law.⁹³ Indiana first stated this rule in *Cole Real Estate Corp. v. Peoples Bank & Trust Co.*,⁹⁴ in which the court held that a majority shareholder who treated all profits as his or her own, did not hold annual shareholder meetings, and whose salary was not approved by the directors, breached a fiduciary duty to the minority shareholders by accepting unreasonable compensation.⁹⁵

According to one commentator, Indiana has adopted the minority view with respect to the burden of proof in compensation cases by placing that burden upon the minority shareholder to prove that the

90. 84 N.E. 166 (Ind. Ct. App. 1908).

91. *Id.* at 170.

92. See *Lowry v. Lowry*, 590 N.E.2d 612 (Ind. Ct. App. 1992); *Cole Real Estate Corp. v. Peoples Bank & Trust Co.*, 310 N.E.2d 275 (Ind. Ct. App. 1974).

93. *Cole*, 310 N.E.2d at 279-80.

94. 310 N.E.2d 275 (Ind. Ct. App. 1974).

95. *Id.* at 279-80.

compensation is unreasonable.⁹⁶ In defending its new rule, the court in *Cole* said: “[A] court of equity cannot act as the regulator of a private corporation and should not substitute its judgment for that of the board of directors in determining what is a fair and reasonable compensation for corporate officers.”⁹⁷ Under the majority view, once a minority shareholder alleges that the corporation is paying unreasonable compensation to a majority shareholder, the recipient bears the burden of justifying the reasonableness of her compensation.⁹⁸

The standard of proof in compensation cases requires a minority shareholder to show that the compensation is “unjust, oppressive, or fraudulent.”⁹⁹ In *Krukemeier v. Krukemeier Machine & Tool Co.*, the plaintiff-minority shareholder failed to meet this burden where the majority shareholders had increased their own salaries and reduced the minority shareholder’s dividend. *Krukemeier* involved three brothers who shared equal ownership of a small, tool and die corporation. Two of the brothers were actively engaged in the operation of the business. A third brother was not actively involved in the business; however, he served as an officer and director. The two brothers attempted to buy out the inactive brother’s shares in accordance with a previous buy/sell agreement, but they could not agree on a fair price. At about the same time, the two brothers acted on their belief that their pay was grossly inadequate and increased their salaries approximately threefold from the preceding year. Later, the two brothers removed the third brother as an officer and director. The third brother did, however, continue to receive his one-third share of the dividends.

The aggrieved brother brought suit against the corporation for return of excess compensation.¹⁰⁰ The two brothers filed a counterclaim for specific performance of the buy-sell agreement.¹⁰¹ The trial court rejected the aggrieved brother’s claims and ordered the corporation to redeem, and the brother to sell all of his shares at a value determined by the corporation’s accountant in accordance with the buy/sell agreement.¹⁰² The First District Court of Appeals affirmed the judgment of the trial court, holding that the majority shareholders had not breached a fiduciary duty because the evidence at trial showed that the salary increases were

96. 19 GALANTI, *supra* note 9, at 197.

97. *Cole*, 310 N.E.2d at 279.

98. 19 GALANTI, *supra* note 9, at 197.

99. *Krukemeier v. Krukemeier Mach. & Tool Co.*, 551 N.E.2d 885, 888 (Ind. Ct. App. 1990).

100. *Id.* at 887. The minority shareholders also sought damages for lost dividends, repurchase of stock, appointment of a receiver and declaration of a constructive trust.

101. *Id.*

102. *Id.*

reasonable in light of the corporation's profitability, that total dividends were more than three times greater than in preceding years, and that the majority shareholders approved the increases in accordance with corporate formalities.¹⁰³

In a 1992 case, *Lowry v. Lowry*,¹⁰⁴ minority shareholders prevailed in a claim which alleged that majority shareholders paid themselves excessive salaries. In *Lowry*, the majority shareholders were responsible for the management of a family-owned farm. According to the evidence presented at trial, a reasonable management fee would have been ten percent of the gross profits. The challenged shareholders received payment well in excess of this amount. In addition, the challenged shareholders did not negotiate for their salaries. Instead, they paid themselves "essentially all profits realized by the corporation."¹⁰⁵ The court in *Lowry* concluded that the evidence supported the trial court's judgment that the majority shareholders had breached a fiduciary duty to minority shareholders by paying themselves excessive compensation.¹⁰⁶

B. Corporate Opportunity

The "corporate opportunity" doctrine holds that "a corporate fiduciary may not appropriate to his own use a business opportunity that in equity and fairness belongs to the corporation."¹⁰⁷ In determining whether a corporate opportunity belongs to the corporation, the court considers the facts and circumstances of each case.¹⁰⁸

The general rule is that a fiduciary cannot lure away the corporate business or clients who in equity and fairness belong to the corporation.¹⁰⁹ A fiduciary violates his fiduciary duty by secretly acquiring necessary corporate business property either to offer it or to sell it to the corporation at an advanced price, thus taking advantage of the corporation's necessities.¹¹⁰ The fiduciary also violates his duty by using corporate property in any other way so as to injure the corporation.¹¹¹ Additionally, a fiduciary violates the corporate opportunity doctrine when he or she

103. *Id.* at 888.

104. 590 N.E.2d 612 (Ind. Ct. App. 1992).

105. *Id.* at 621.

106. *Id.* at 622.

107. *Hartung v. Architects Hartung/Odle/Burke, Inc.*, 301 N.E.2d 240, 244 (Ind. Ct. App. 1973); *see also* *Tower Recreation, Inc. v. Beard*, 231 N.E.2d 154, 155-56 (Ind. Ct. App. 1967).

108. *Hartung*, 301 N.E.2d at 244.

109. *Id.* at 245.

110. *Tower*, 231 N.E.2d at 155-56 (quoting *Black v. Parker Mfg. Co.*, 106 N.E.2d 544, 549 (Mass. 1952)).

111. *Id.*

interferes with the corporation's property lease agreement by leasing the property for his or her own personal business without the approval of the other shareholders.¹¹² Several Indiana cases illustrate these corporate opportunity principles.

In *Hartung v. Architects/Odle/Burke, Inc.*, the court of appeals found that a shareholder in an architectural business violated a fiduciary duty to the other shareholders by leasing corporation offices for his own business use contrary to the interest of the corporation.¹¹³ Further, the court found that the shareholder also violated his fiduciary duty by luring clients of the business away from the corporation and to his own business.¹¹⁴ The court in *Lowry* found that the controlling shareholders of a farm corporation violated a fiduciary duty to the minority shareholders by mortgaging corporate property for their own personal benefit, without the knowledge or consent of the other directors or shareholders.¹¹⁵ In *Dotlich v. Dotlich*,¹¹⁶ the court held that a shareholder's purchase of a farm, which represented a valuable investment opportunity for the corporation, was a breach of fiduciary duty where the shareholder did not first make disclosure and obtain consent from the other shareholders.¹¹⁷

C. *Misappropriation of Corporate Property*

The law presumes fraud when one charges an individual standing in a fiduciary relationship with misappropriating corporate property.¹¹⁸ The court in *Dotlich* noted that after such a charge, the burden of proof shifts to the party with the fiduciary duty to overcome the presumption by showing his actions were honest and in good faith."¹¹⁹ In *Dotlich*, four brothers were shareholders in a family-owned business that rented heavy equipment. As the business grew, the brothers used corporate funds to purchase and maintain various real estate. However, the brother in charge of making the transactions titled the properties in his own name, instead of the corporation's name, claiming them as his own. When two of the brothers learned of the brother's self-dealing transactions, they sued him and the other brother, who aided and abetted his acts, for breach of fiduciary duty. The trial court found for the corporation, imposed a constructive trust on the property, and ordered

112. *Hartung*, 301 N.E.2d at 245.

113. *Id.*

114. *Id.*

115. *Lowry v. Lowry*, 590 N.E.2d 612, 622-23 (Ind. Ct. App. 1992).

116. 475 N.E.2d 331 (Ind. Ct. App. 1985).

117. *Id.* at 342.

118. *Id.*; see also *Ross v. Tavel*, 418 N.E.2d 297, 304 (Ind. Ct. App. 1981).

119. *Dotlich*, 475 N.E.2d at 342.

the self-dealing brother to reconvey the property to the corporation.¹²⁰ The First District Court of Appeals affirmed the trial court's judgment.¹²¹ The court found that the self-dealing brother had breached a fiduciary duty by retaining title to the property acquired during the questioned transaction.¹²²

D. Sale of Shares

The partnership expectation of shareholder equality carries with it a duty to disclose to the other shareholders the availability of outstanding shares for sale and to afford them the opportunity to share in the purchase of the available shares upon each principal in a close corporation.¹²³ Consideration for the issuance or sale of corporate shares must be fair.¹²⁴ Indiana permits the shareholders in close corporations to enter into fixed price stock agreements because "there is seldom a market for those shares, and it is difficult and speculative to value those shares."¹²⁵ *Cressy v. Shannon Continental Corp.*¹²⁶ involved a two-person corporation whose primary asset was an office building. Mr. Russell and Mr. Cressy formed the corporation intending to be "equal" partners. Later, the board resolved to sell additional stock. Without Cressy's knowledge, Russell soon thereafter sold the stock to his parents. Mr. DeFries, the corporation's treasurer, was also given stock in the corporation for his accounting work. Without Russell's knowledge, Cressy purchased DeFries' stock. However, Cressy was unsuccessful in attempting to secure transfer of those shares into his name on the corporate records. Consequently, Cressy filed suit. The court of appeals affirmed a judgment by the trial court holding that Cressy and Russell each breached a fiduciary duty owed to the other as shareholders in a close corporation where the shareholders intended equal ownership and control of the business.¹²⁷

The court in *Cressy* relied on the concept of an "incorporated partnership" in departing from the traditional norms of corporate law, which would permit a shareholder to freely transfer shares in a corporation. Here, the court tailored the law to meet the expectations of

120. *Id.* at 335-36.

121. *Id.* at 336.

122. *Id.* at 342.

123. *Cressy v. Shannon Continental Corp.*, 378 N.E.2d 941, 945 (Ind. Ct. App. 1978); *see also* *Hardy v. South Bend Sash & Door Co.*, 603 N.E.2d 895, 899 (Ind. Ct. App. 1992); *Krukemeier v. Krukemeier Mach. & Tool Co.*, 551 N.E.2d 885, 890 (Ind. Ct. App. 1990).

124. *See* *Garbe v. Excel Mold, Inc.*, 397 N.E.2d 296 (Ind. Ct. App. 1979).

125. *Hardy*, 603 N.E.2d at 899 (citing *Krukemeier*, 551 N.E.2d at 890).

126. 378 N.E.2d 941 (Ind. Ct. App. 1978).

127. *Id.* at 945.

the parties—that they be treated as partners in their dealings among themselves.¹²⁸

In a 1992 case, *Hardy v. South Bend Sash & Door Co.*,¹²⁹ the court of appeals upheld a stock purchase agreement that allowed the shareholders to determine the method of valuation and required a shareholder wishing to sell or transfer his or her shares to first offer the stock to another shareholder.¹³⁰ The controlling shareholders purchased the shares of a minority director-shareholder. Consequently, the minority director-shareholder contended that the majority shareholders violated a fiduciary duty they owed him by failing to provide him with the corporation's financial report. The minority shareholder alleged that their failure to provide him with a report misrepresented the true financial condition of the corporation and, as a consequence, misrepresented the stock's value.

The court recognized that the shareholders owed a fiduciary duty to each other, but the existence of the duty in this instance depended upon whether the corporation or the director, individual, had been acquiring the stock from the shareholder.¹³¹ The court noted that a director acting for the corporation in the purchase of its own stock stands in a fiduciary relationship to the stockholder from whom the director purchased the stock and is under a duty to disclose to the shareholder the facts affecting the value of the stock.¹³² However, the court explained that a director who sells his own shares or "buys shares from other shareholders for his personal ownership owes no fiduciary duty to disclose information he possesses regarding the value of the stock to the other shareholders, provided that, such a sale does not affect the general well-being of the corporation."¹³³

The agreement in *Hardy* dealt with the sale of shares between the shareholders. The agreement also provided that a mutual agreement of the parties and not by the financial report, would determine the stock's value. Therefore, the court concluded there was no duty to disclose the financial report. The court also found it important to note that the director-shareholder was not unfamiliar with the corporation's operation, and that the corporation had provided him with financial information on past occasions. Further, the court held that the shareholders did not breach a fiduciary duty to the minority shareholder on a theory of

128. *Id.*

129. 603 N.E.2d 895 (Ind. Ct. App. 1992).

130. *Id.* at 899.

131. *Id.* at 900.

132. *Id.*

133. *Id.*

constructive fraud because the shareholders actively had not concealed financial information from him.¹³⁴

E. Employment

The denial of employment to a minority shareholder in a close corporation often may produce an immediate financial crisis for that shareholder.¹³⁵ Shareholders in close corporations often invest a large part of their personal resources in the corporation expecting to serve as a key employee, a director, or as a principal officer.¹³⁶ Because close corporations typically do not pay dividends, a shareholder to whom the corporation denies employment effectively may realize nothing more than a token return on his investment, even though that investment may be substantial. A shareholder faced with this precarious situation may feel pressure to accept a majority shareholder's offer to buy his stock at a price far less than the stock's actual value.¹³⁷

Wilkes v. Springside Nursing Homes, Inc.,¹³⁸ was one of the earliest decisions in the country to recognize a breach of fiduciary duty action for employment termination in a close corporation. As discussed earlier, the court in *Wilkes* required the majority shareholders to demonstrate a legitimate business purpose when a minority shareholder whose employment they have terminated challenges them.¹³⁹ Even when the majority shareholders assert a legitimate business purpose for their termination of the minority shareholder, "it is open to minority stockholders to demonstrate that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest."¹⁴⁰ The court will then "weigh the legitimate business purpose, if any, against the practicability of a less harmful alternative."¹⁴¹

Thus far, one Indiana court has followed the *Wilkes* decision. The First District Court of Appeals in *W & W Equipment Co. v. Mink*¹⁴² announced that the act of majority shareholders in denying employment to a minority shareholder in order to freeze him out may amount to a breach of fiduciary duty.¹⁴³ In *Mink*, the controlling shareholders

134. *Id.* at 901-02.

135. For further discussion, see 1 O'NEAL & THOMPSON, *supra* note 3, § 3.06, at 37.

136. *Id.*

137. *Id.*

138. 353 N.E.2d 657 (Mass. 1976). See text accompanying notes 39-45.

139. *Id.* at 663.

140. *Id.*

141. *Id.*

142. 568 N.E.2d 564 (Ind. Ct. App. 1991). See text accompanying notes 77-84.

143. *Id.* at 574.

argued that because the minority shareholder was an employee, they could terminate him at will under the general rule of employment relationships in Indiana.¹⁴⁴ The court dismissed this argument as being misplaced because the cause of action was one for breach of fiduciary duty, not for wrongful termination.¹⁴⁵

The court in *Mink* based its decision on *Wilkes*, explaining that "as noted by the Massachusetts Supreme Court, the denial of employment to a minority shareholder in a close corporation 'is especially pernicious in some instances.'"¹⁴⁶ The court added: "A minority stockholder typically depends on his salary as the principal return of his investment, since the earnings of a close corporation are mainly distributed as salaries, bonuses, and retirement benefits."¹⁴⁷ The court in *Mink* relied upon *Gabhart's* holding that a freeze-out transaction, such as a denial of employment, may amount to a breach of trust.¹⁴⁸

F. Declaring Dividends

According to commentators F. Hodge O'Neal and Robert B. Thompson, the withholding of dividends is the most frequently used "freeze-out" technique in close corporations.¹⁴⁹ It is simple to apply and generally exerts great pressure on minority shareholders to sell their shares.¹⁵⁰ By not declaring any dividends or by keeping dividends low, majority shareholders may be able to force a minority shareholder to sell his or her interest for considerably less than its actual value. The technique can be particularly devastating in a Subchapter S corporation if the minority shareholder must pay income taxes on income which he or she is not actually receiving, but which for tax purposes is attributable to him or her.¹⁵¹

O'Neal and Thompson also note that corporations often couple dividend withholding with other types of oppression.¹⁵² For example, a dividend squeeze is ineffective if the shareholder being squeezed also draws a substantial salary from the corporation. Therefore, the corporation usually terminates the shareholder's employment in addition to withholding dividends. Also, majority shareholders typically immunize

144. *Id.*

145. *Id.*

146. *Id.* (quoting *Wilkes v. Springside Nursing Homes, Inc.*, 353 N.E.2d 657, 662 (Mass. 1976)).

147. *Id.*

148. *Id.* at 575.

149. 1 O'NEAL & THOMPSON, *supra* note 3, § 3.04, at 13.

150. *Id.*

151. *Id.*

152. *Id.*

themselves from the adverse effects of a dividend squeeze by increasing their own salaries and benefits.¹⁵³

The corporation's board of directors has within its discretion the power to declare dividends on outstanding stock issues.¹⁵⁴ However, when the board of directors fails to declare a distribution of profits that a shareholder feels is warranted, the shareholder is not without a remedy in Indiana. An action will lie in equity by which an aggrieved shareholder may obtain a dividend.¹⁵⁵ Such equitable remedy is available both to preferred stockholders and to common stockholders alike.¹⁵⁶

Because of the broad discretionary power that the law vests in the management of the corporation, the shareholder bears the "necessarily stringent" burden of proving the necessity of equitable relief.¹⁵⁷ The court in *Cole Real Estate Corp. v. Peoples Bank & Trust Co.* explained: "Only a clear abuse of discretion, established by proof of bad faith, oppressive or illegal action, will justify the intervention of a court of equity."¹⁵⁸ Directors may not use their powers "illegally, wantonly, or oppressively."¹⁵⁹

In *Cole*, the Third District Court of Appeals affirmed a trial court judgment compelling the Cole Real Estate Corp. to declare a dividend for several years. Helen Cole, the majority shareholder, owned all but eighty-six of the 4,120 outstanding shares. The Peoples Bank and Trust Company held the remaining eighty-six shares in trust. The court in *Cole* cited several important facts which supported an equitable remedy for the minority shareholder: the corporation had failed to declare a dividend for sixteen years, the majority shareholder's exercise of complete control over corporate assets and operation, the majority shareholder control over all the stock other than that which the complaining shareholder held, and the corporations had accrual of sufficient earned surplus on its treasury to allow the minority shareholders a reasonable dividend.¹⁶⁰ The court also found that these facts supported a conclusion that Cole had "acted oppressively and in bad faith" in failing to declare a dividend.¹⁶¹

153. *Id.*

154. *See* IND. CODE §§ 23-1-28-1 to -6 (1988).

155. *See* *Cole Real Estate Corp. v. Peoples Bank & Trust Co.*, 310 N.E.2d 275, 280 (Ind. Ct. App. 1974).

156. *Id.* at 281.

157. *Id.* at 280.

158. *Id.*

159. *Id.* (quoting *W.Q. O'Neill Co. v. O'Neill*, 25 N.E.2d 656, 659 (Ind. Ct. App. 1940)).

160. *Id.* at 282.

161. *Id.* The court in *Cole* also found that Cole's conduct was oppressive because she paid herself excessive compensation.

G. Mergers

Majority shareholders sometimes resort to fundamental changes in the corporation, such as a statutory merger proceeding, to eliminate minority shareholders.¹⁶² Every state has a statutory procedure by which a majority of shareholders may combine two or more corporations into a single corporation even though not all of the shareholders approve.¹⁶³ When the process results in the survival of one of the constituent corporations, we refer to the procedure as a "merger."

Most merger statutes provide that the shares of each merging company will be converted into securities of a different corporation other than the surviving company or into cash or other property.¹⁶⁴ Thus, the shareholders of a constituent corporation can be paid off and eliminated summarily and directly from the resulting enterprise. O'Neal and Thompson observe that merger statutes make it easier for controlling shareholders to victimize the minority shareholders by stating: "The permissive nature of most merger provisions gives managerial control to the majority and relegates minority shareholder status to that of a fungible dollar claim."¹⁶⁵

The Supreme Court of Indiana recognized in *Gabhart v. Gabhart*¹⁶⁶ that a minority shareholder may be entitled to equitable relief where the majority effects a merger for the sole purpose of freezing out the minority shareholder. However, it expressly did not recognize such a transaction to be breach of fiduciary duty.¹⁶⁷ In *Gabhart*, four family members and another individual formed a corporation to operate a nursing home. The shareholders divided shares of stock equally among each of them. Each shareholder served as a director and participated in the management of the business. Later, one of the shareholders resigned as director after he became involved in another business which required him to travel out of state. The other shareholders unsuccessfully negotiated for the purchase of the departing director's shares. Having failed to purchase his shares, the other shareholders conceived and carried out a corporate restructuring in accordance with Indiana's corporate law, whereby the assets of the corporation were transferred to a new corporation in which the shareholder would own no shares. Instead, the

162. 1 O'NEAL & THOMPSON, *supra* note 3, § 5.04, at 21.

163. *Id.*

164. *Id.* at 23.

165. *Id.* at 25.

166. 370 N.E.2d 345 (Ind. 1977).

167. The court deliberately avoided carrying its holding any further because it was concerned that such a holding would lead to judicial review of every proposed merger. The court said, "We do not believe the judiciary should intrude into corporate management to that extent." *Id.* at 356.

new corporation would compensate the shareholder for his interest in the old corporation by issuing a debenture, which the new corporation would quickly pay off.

The "squeezed-out" shareholder did not attend the meeting at which the shareholders voted for the merger, nor did he avail himself of the statutory appraisal rights that Indiana law provides for dissenting shareholders.¹⁶⁸ Instead, the aggrieved shareholder filed an action in federal court in which he challenged the validity of a "freeze-out" merger. He claimed that the sole purpose of the merger was to deprive him of his equity interest in the corporation. The district court granted the defendant shareholders' motion for summary judgment, holding that appraisal was the plaintiff's exclusive remedy under Indiana law.¹⁶⁹ On appeal, the Seventh Circuit Court of Appeals certified several questions to the Supreme Court of Indiana because the case presented questions of first impression under Indiana law.¹⁷⁰

In rejecting the controlling shareholders' argument that the complaining shareholder's sole remedy was the appraisal rights under the merger statute, the court characterized a "proposed merger which has no valid purpose" as a "de facto dissolution."¹⁷¹ Accordingly, the court held that the shareholder could vote on the issue of dissolution.¹⁷² The court also characterized such a transaction as a "freeze-out" or a "squeeze-out," but it specifically refrained from basing its decision on fiduciary principles.¹⁷³

V. OTHER ISSUES

A. *Direct Versus Derivative Actions*

A derivative suit generally challenges an action taken by majority shareholders or directors based on breach of fiduciary duty.¹⁷⁴ In a derivative action, the plaintiff shareholder brings suit in the name of

168. Under now-superseded law, a shareholder entitled to vote in regards to a merger plan could object and demand payment for the value of his shares. If the value could not otherwise be agreed upon, a judicial appraisal procedure was available. IND. CODE ANN. § 23-1-5-7 (West 1976), replaced by IND. CODE § 23-1-40-1 (Supp. 1992).

169. *Gabhart v. Gabhart*, No. 73-1632 (S.D. Ind. May 1, 1973) (order granting summary judgment).

170. *Gabhart v. Gabhart*, No. 75-1090, slip op. at 2 (7th Cir. March 8, 1977).

171. *Gabhart*, 370 N.E.2d at 356.

172. *Id.*

173. *Id.* Though Indiana does not recognize a merger effected for no legitimate business purpose as a breach of fiduciary duty, the Supreme Court of Delaware did so hold in *Singer v. Magnavox*, 367 A.2d 1349 (Del. Ch. 1976).

174. 2 O'NEAL & THOMPSON, *supra* note 3, § 7.07, at 51.

the corporation to redress the defendant's breach of duty to the corporation and to the shareholders as a group.¹⁷⁵ If the plaintiff asserts personal rights, distinct from any derived injury arising from the shareholder's proportional ownership of the corporation, the suit against defendants is direct and not derivative.¹⁷⁶ The distinction between direct and derivative suits may be important because of the various procedural limitations on derivative suits that may affect recovery.

The general rule in Indiana is that shareholders of a corporation cannot maintain actions in their own name to redress an injury to the corporation.¹⁷⁷ The primary reason for disallowing shareholder actions is to prevent "multitudinous litigation and disregard for the corporate entity."¹⁷⁸ Defenders of the rule cite the following reasons for its defense: it protects corporate creditors by placing the proceeds of the recovery back in the corporation, it protects the interests of all the shareholders rather than allowing one shareholder to prejudice the interests of other shareholders, and it provides adequate compensation of the injured shareholder by increasing the value of the shares when the corporation receives the recovery.¹⁷⁹

An aggrieved shareholder in a close corporation will ordinarily find a derivative action neither available nor attractive because it will often be difficult, if not impossible, to show injury to the corporation. If one can show an injury, a corporate recovery primarily will benefit the majority shareholders. Thus, a distribution of recovery would make a derivative suit undesirable.¹⁸⁰ Indiana recognizes the shortcomings of the rule in the context of close corporations. The court in *Cole Real Estate Corp. v. Peoples Bank & Trust Co.* held that a minority shareholder may institute an individual action without a previous requirement for corporate action when the directors of that corporation act in their own interests, or when a majority shareholder acts illegally or oppressively in the name of the corporation.¹⁸¹ As the court in *Cole* commented: "Equity does not require the doing of a useless act."¹⁸² Similarly, the court in *Mink* found that the reasons for requiring a derivative action

175. *Id.*

176. *Id.* at 52.

177. *See* *W & W Equip. Co. v. Mink*, 568 N.E.2d 564, 570-71 (Ind. Ct. App. 1991).

178. *Id.* at 571 (citing *Moll v. South Cent. Solar Sys., Inc.*, 419 N.E.2d 154 (Ind. Ct. App. 1981)).

179. *Id.*

180. *See generally* *Peeples*, *supra* note 3, at 481-82.

181. *Cole Real Estate Corp. v. Peoples Bank and Trust Co.*, 310 N.E.2d 275, 278-79 (Ind. Ct. App. 1974). *See also* *Scott v. Anderson Newspapers, Inc.*, 477 N.E.2d 553, 563 (Ind. Ct. App. 1985).

182. *Cole*, 310 N.E.2d at 279.

were not present in a breach of fiduciary action involving a close corporation.¹⁸³ The court in *W & W Equipment Co. v. Mink* cautioned that its holding did not mean that a derivative action is unnecessary if the aggrieved parties are in a close corporation. The court asserted: "Our holding is, rather, that the trial court did not err in allowing this cause of action to proceed absent compliance with the derivative requirements because there were only two shareholders, one of whom was involved in the breach of fiduciary duty."¹⁸⁴ Also, in *Gabhart v. Gabhart* the Indiana Supreme Court permitted a former shareholder of a merged corporation to challenge the merger action directly, because the merger would have eliminated his means of redress.¹⁸⁵

Even if a person desires a derivative action, there are other limitations he or she must consider. A shareholder may not bring a derivative action where all the shareholders have participated in the alleged wrong.¹⁸⁶ Likewise, the corporation would not be entitled to bring an action under such circumstances.¹⁸⁷ In *Dotlich v. Dotlich*, the court observed that a person could bring a derivative action only if he did not participate in the wrong.¹⁸⁸ Further, the court noted that a shareholder is not barred from suing on behalf of the corporation simply because he also happens to be a director.¹⁸⁹ Finally, the court in *Dotlich* maintained that granting a director the right to sue improves "the director's performance of the stewardship obligation which he owes to the corporation and its stockholders and to protect him from possible liability for failure to proceed against those responsible for improper management."¹⁹⁰

B. Damages

1. *Compensatory Damages*.—Indiana's corporate statute provides that a trial court may dissolve a corporation under certain circumstances, one of which is director or shareholder deadlock.¹⁹¹ Shareholders in close corporations are not limited to this remedy. The injured shareholder in a close corporation may recover compensatory damages when a breach of fiduciary duty has occurred.¹⁹² In *Mink* the defendant shareholders argued that the trial court erred in awarding the aggrieved shareholder damages in addition to dissolving the corporation.¹⁹³ The defendant

183. *Mink*, 568 N.E.2d at 576.

184. *Id.* at 576-77.

185. *Gabhart v. Gabhart*, 370 N.E.2d 345, 356-58 (Ind. 1977).

186. *See Dotlich v. Dotlich*, 475 N.E.2d 331, 339 (Ind. Ct. App. 1985).

187. *Id.* at 339.

188. *Id.*

189. *Id.* at 340.

190. *Id.* at 339 (quoting *Tenney v. Rosenthal*, 160 N.E.2d 463, 467 (N.Y. 1959)).

191. *See* IND. CODE § 23-1-47-1 (1992).

192. *W & W Equip. Co. v. Mink*, 568 N.E.2d 564, 576 (Ind. Ct. App. 1991); *see*

shareholders cited *Gabhart* for the proposition that dissolution is the aggrieved shareholder's sole remedy.¹⁹⁴ The court correctly pointed out that *Gabhart* had addressed the narrow question of whether shareholders in a corporation which has effected a merger are limited to appraisal rights, or whether they can petition for dissolution of the corporation. The *Mink* court responded: "It does not hold that shareholders in a close corporation are prohibited from recovering compensatory damages when there has been a breach of fiduciary duty owed to them."¹⁹⁵

The purpose of damages is to award or impose a pecuniary compensation, recompense or satisfaction for an injury or a wrong a party has sustained.¹⁹⁶ When a failure to conform to a fiduciary duty is the basis of liability, the measure of damages is the entire loss sustained.¹⁹⁷ The law does not require a specific degree of certainty, but probative evidence must support the award. Moreover, the court cannot base the award upon mere conjecture or speculation.¹⁹⁸

In *Mink*, where an oppressive majority had squeezed the victimized shareholder out of the corporation, the court upheld an award of compensatory damages in an amount necessary for the shareholder to "re-establish himself to the position he was in" prior to the breach.¹⁹⁹ In *Mink's* case, that amount was what he needed "to start cold, acquir[e] product lines, begin [. . .] to market on brand new product lines," taking into account the "two year lag before income beg[an] to cover expenses."²⁰⁰ In *Hartung*, the breaching shareholder lured away corporate clients and leased corporate office space. The court awarded the non-breaching shareholders compensatory damages as measured by the amount of fees earned on projects of the former corporate clients, the inconvenience and expense of vacating the premises rented by the corporation, and expenditures incurred in terminating the corporate affairs.²⁰¹

2. Punitive Damages.—In addition to compensatory damages, one may recover punitive damages where there is clear and convincing evidence that the breaching shareholders acted with malice, fraud, gross negligence,

also *Hartung v. Architects Hartung/Odle/Burke, Inc.*, 301 N.E.2d 240, 246 (Ind. Ct. App. 1973) (upholding trial court's award of damages for breach of fiduciary duty).

193. *Mink*, 568 N.E.2d at 576.

194. *Id.*

195. *Id.*

196. *Id.* (quoting *Indiana Univ. v. Indiana Bonding & Sur. Co.*, 416 N.E.2d 1275, 1288 (Ind. Ct. App. 1981)).

197. *Id.* (citing *Clayton v. Farish*, 73 N.Y.S.2d 727 (N.Y. Sup. Ct. 1947)).

198. *Id.* at 576-77.

199. *Id.* at 577.

200. *Id.*

201. *Hartung v. Architects Hartung/Odle/Burke, Inc.*, 301 N.E.2d 240, 246 (Ind. Ct. App. 1973).

or oppression. Moreover, that evidence must show that the act did not result from mistake of law or fact, honest error of judgment, overzealousness, mere negligence, or other human failing.²⁰² The court in *Dotlich* found punitive damages appropriate where the breaching shareholder titled corporate property in his own name and claimed it as his own, even though the shareholder who merely "aided and abetted" these wrongful acts would not be subject to punitive damages.²⁰³ According to the court in *Mink*, the breaching shareholders' scheming acts in removing a shareholder from the corporation so another shareholder could receive money upon his retirement amounted to "oppressive and malicious" conduct which supported an award of punitive damages.²⁰⁴ An award of compensatory damages is not always a prerequisite to an award of punitive damages. According to *Dotlich*, a court may award punitive damages where a court previously had granted "affirmative relief of an equitable nature" regardless of whether the court has awarded compensatory damages.²⁰⁵

VI. CONCLUSION

The "incorporated partnership" concept of close corporations has a long history in Indiana, yet the precise fiduciary duty arising from this special relationship between the shareholders in close corporations remains somewhat elusive. In reviewing future disputes arising between shareholders in close corporations, Indiana courts should review and reflect on the origins of the "incorporated partnership" concept, and give it the full effect intended. By expressly adopting the strict good faith standard, along with a burden-shifting and balancing approach, courts may best meet the expectations and intentions of the parties in close corporations. Finally, the adoption of the strict good faith standard will clarify the status of the law in Indiana, and will provide direction as to what acts, which might otherwise be protected by the business judgment rule or corporate democracy principles, will constitute a breach of fiduciary duty.

202. See *Mink*, 568 N.E.2d at 577; *Dotlich v. Dotlich*, 475 N.E.2d 331, 345 (Ind. Ct. App. 1985).

203. *Dotlich*, 475 N.E.2d at 346.

204. *Mink*, 568 N.E.2d at 577-78.

205. *Dotlich*, 475 N.E.2d at 346.

INDIANA LAW REVIEW

VOLUME 26

1992 - 1993

AUTHOR, TITLE AND CASE INDEX

The Trustees of Indiana University

Copyright © 1993

CONTRIBUTOR INDEX

ARTICLES

Baude, Patrick, <i>Recent Constitutional Decisions in Indiana</i> .	853
Bethel, Terry A., <i>Recent Employment Law Decisions of the Seventh Circuit and the Indiana Courts</i>	1065
Betz, Kevin W., <i>An Examination of the Indiana Supreme Court Docket, Dispositions, and Voting in 1992</i>	691
Blum, Karen M., <i>Qualified Immunity: A User's Manual</i>	187
Bodensteiner, Ivan E., <i>Evidence: Indiana Moves Toward Adoption of the Federal Rules</i>	965
Boshkoff, Douglass G., <i>Bankruptcy in the Seventh Circuit: 1992</i>	749
Brown, Kevin, <i>Recent Developments in the Termination of School Desegregation Decrees</i>	867
Burke, Susan D., <i>Update—Criminal Law and Procedure</i>	891
Carro, Jorge L., <i>The Ethics Opinions of the Bar: A Valuable Contribution or an Exercise in Futility?</i>	1
Crimm, Nina J., <i>A Role for "Expert Arbitrators" in Resolving Valuation Issues Before the United States Tax Court: A Remedy to Plaguing Problems</i>	41
Day, Christian C., <i>The Teaching of Legal Classics</i>	263
Hamilton, John C., <i>Environmental Law: The Roles of Commerce, Citizens, and the Land in an Era of Intensifying Competition</i>	921
Haycox, Rolanda Moore, <i>1992: A Year of Change for Our Health Care System</i>	1003
Huffer, Steven K. & Klezmer, Randal M., <i>Survey of 1992 Developments in the Indiana Law of Product Liability</i>	1203
Jegen, III, Lawrence A. & Maley, John R., <i>1992 Developments in Indiana Taxation</i>	1145
Jordan, Karen A. & Lewis, Neal, <i>Survey of 1992 Developments in Tort Law</i>	1159
Kidd, Charles M., <i>Survey of 1992 Developments in the Indiana Law of Professional Responsibility</i>	1097
Kidwell, Brent Edward, <i>The Americans with Disabilities Act of 1990: Overview and Analysis</i>	707
Krieger, Walter, <i>1992 Developments in Indiana Property Law</i>	1113
Leedes, Gary C., <i>Rediscovering the Link Between the Establishment Clause and the Fourteenth Amendment: The Citizenship Declaration</i>	469
Lester, Toni, <i>The Reasonable Woman Test in Sexual Harassment Law—Will It Really Make a Difference?</i>	227

Maley, John R., <i>1992 Federal Practice and Procedure Update for Seventh Circuit Practitioners</i>	817
Neisser, Joan, <i>Disclosing Adolescent Suicidal Impulses to Parents: Protecting the Child or the Confidence?</i>	433
Patton, Jr., George T., <i>1992 Developments in Indiana Appellate Procedure: Of Timely Praecipes, Interlocutory Appeals, and Civility</i>	799
Port, Kenneth L., <i>The Illegitimacy of Trademark Incontestability</i>	519
Ruge, Thomas R. & Fuller, Rhonda L., <i>Survey of Recent Developments in Medical Malpractice Law</i>	1023
Ruppert, Michael G. & Cross, Nancy L., <i>The Progression of Indiana's Family Law in 1992</i>	977
Scott, Ridgeley A., <i>Misuse of Public Pension Assets: White Collar Crimes and Other Offenses</i>	589
Smith, Elizabeth A., <i>Recent Developments in Corporation Law</i>	781
Solloway, Robert G., <i>Developments in Contract and Commercial Law</i>	761
Trimble, John C. & Shoultz, Richard K., <i>Survey of Recent Developments in Insurance Law</i>	1051
Van Winkle, John R. & Welsh, Gary R., <i>Origin, Development, and Current Status of Fiduciary Duties in Close Corporations: Has Indiana Adopted a Strict Good Faith Standard?</i>	1215

COMMENTS

Simon, Thomas W., <i>Fighting Racism: Hate Speech Detours</i>	411
Wald, Patricia M., <i>Some Real-Life Observations About Judging</i>	173

BOOK REVIEW

Torke, James W., <i>"Grand Theory" and Constitutional Change</i>	677
--	-----

NOTES

Ficklin, Amy L., <i>Dumping Drug Dealers Off the Dole: An Examination of the Procedural Due Process Implications of Pre-Hearing Seizures of Public Housing Leaseholds from Tenants Involved in Drug Trafficking</i>	89
Fisher, Karen L., <i>Federal Court Jurisdiction in Civil Forfeitures of Personal Property Pursuant to the Comprehensive Drug Abuse Prevention and Control Act</i>	657

Hodgson, Anita M., <i>The Warranty of Sperm: A Modest Proposal to Increase the Accountability of Sperm Banks and Physicians in the Performance of Artificial Insemination Procedures</i>	357
Kidwell, Brent E., <i>A Nation Divided: By What Standard Should Fourth Amendment Seizure Findings Be Reviewed on Appeal?</i>	117
Mick, Mitchel A., <i>Personal Liability for Bank Directors Who Violate Lending Limit Statutes: Has Indiana Followed Congress' Lead?</i>	387
Mitchell, Michael J., <i>Curiouser and Curiouser: The United States Supreme Court Continues Its Assault on Federal Habeas Corpus</i>	65
Morrison, Catherine M., <i>The Scope of Federal Preemption: How Far May States Go in Regulating Multiple Employer Welfare Arrangements Established Under ERISA?</i>	151
Roberge, Elizabeth A., <i>Operation Rescue's Anti-Abortion Rescue Blockades and 42 U.S.C. § 1985(3) (a/k/a the Ku Klux Klan Act)</i>	333
Smith, Michael Ray, <i>Limiting the Discretion of the Administrator of Poor Relief in Indiana</i>	631

TITLE INDEX

ARTICLES

1992: A Year of Change for Our Health Care System <i>Rolanda Moore Haycox</i>	1003
1992 Developments in Indiana Appellate Procedure: Of Timely Praecipes, Interlocutory Appeals, and Civility <i>George T. Patton, Jr.</i>	799
1992 Developments in Indiana Property Law <i>Walter Krieger</i>	1113
1992 Developments in Indiana Taxation <i>Lawrence A. Jegen, III</i> <i>John R. Maley</i>	1145
1992 Federal Practice and Procedure Update for Seventh Cir- cuit Practitioners <i>John R. Maley</i>	817
A Role for "Expert Arbitrators" in Resolving Valuation Issues Before the United States Tax Court: A Remedy to Plaguing Problems <i>Nina J. Crimm</i>	41
An Examination of the Indiana Supreme Court Docket, Dis- positions, and Voting in 1992 <i>Kevin W. Betz</i>	691
Bankruptcy in the Seventh Circuit: 1992 <i>Douglass G. Boshkoff</i>	749
Developments in Contract and Commercial Law <i>Robert G. Solloway</i>	761
Disclosing Adolescent Suicidal Impulses to Parents: Protecting the Child or the Confidence? <i>Joan Neisser</i>	433
Environmental Law: The Roles of Commerce, Citizens, and the Land in an Era of Intensifying Competition <i>John C. Hamilton</i>	921
Evidence: Indiana Moves Toward Adoption of the Federal Rules <i>Ivan E. Bodensteiner</i>	965
Misuse of Public Pension Assets: White Collar Crimes and Other Offenses <i>Ridgeley A. Scott</i>	589
Origin, Development, and Current Status of Fiduciary Duties in Close Corporations: Has Indiana Adopted a Strict Good Faith Standard? <i>John R. Van Winkle</i> <i>Gary R. Welsh</i>	1215

Qualified Immunity: A User's Manual <i>Karen M. Blum</i>	187
Recent Constitutional Decisions in Indiana <i>Patrick Baude</i>	853
Recent Developments in Corporation Law <i>Elizabeth A. Smith</i>	781
Recent Developments in the Termination of School Desegregation Decrees <i>Kevin Brown</i>	867
Recent Employment Law Decisions of the Seventh Circuit and the Indiana Courts <i>Terry A. Bethel</i>	1065
Rediscovering the Link Between the Establishment Clause and the Fourteenth Amendment: The Citizenship Declaration <i>Gary C. Leedes</i>	469
Survey of 1992 Developments in the Indiana Law of Product Liability <i>Steven K. Huffer</i> <i>Randal M. Klezmer</i>	1203
Survey of Recent Developments in Insurance Law <i>John C. Trimble</i> <i>Richard K. Shoultz</i>	1051
Survey of Recent Developments in Medical Malpractice Law <i>Thomas R. Ruge</i> <i>Rhonda L. Fuller</i>	1023
Survey of 1992 Developments in Tort Law <i>Karen A. Jordan</i> <i>Neal Lewis</i>	1159
Survey of 1992 Developments in the Indiana Law of Professional Responsibility <i>Charles M. Kidd</i>	1097
The Americans with Disabilities Act of 1990: Overview and Analysis <i>Brent Edward Kidwell</i>	707
The Ethics Opinions of the Bar: A Valuable Contribution or an Exercise in Futility? <i>Jorge L. Carro</i>	1
The Illegitimacy of Trademark Incontestability <i>Kenneth L. Port</i>	519
The Progression of Indiana's Family Law in 1992 <i>Michael G. Ruppert</i> <i>Nancy L. Cross</i>	977

The Reasonable Woman Test in Sexual Harassment Law— Will It Really Make a Difference?	
<i>Toni Lester</i>	227
The Teaching of Legal Classics	
<i>Christian C. Day</i>	263
Update—Criminal Law and Procedure	
<i>Susan D. Burke</i>	891

COMMENTS

Fighting Racism: Hate Speech Detours	
<i>Thomas W. Simon</i>	411
Some Real-Life Observations About Judging	
<i>Patricia M. Wald</i>	173

BOOK REVIEW

“Grand Theory” and Constitutional Change	
<i>James W. Torke</i>	677

NOTES

A Nation Divided: By What Standard Should Fourth Amend- ment Seizure Findings Be Reviewed on Appeal?	
<i>Brent E. Kidwell</i>	117
Curiouser and Curiouser: The United States Supreme Court Continues Its Assault on Federal Habeas Corpus	
<i>Michael J. Mitchell</i>	65
Dumping Drug Dealers Off the Dole: An Examination of the Procedural Due Process Implications of Pre-Hearing Sei- zures of Public Housing Leaseholds from Tenants Involved in Drug Trafficking	
<i>Amy L. Ficklin</i>	89
Federal Court Jurisdiction in Civil Forfeitures of Personal Property Pursuant to the Comprehensive Drug Abuse Pre- vention and Control Act	
<i>Karen L. Fisher</i>	657
Limiting the Discretion of the Administrator of Poor Relief in Indiana	
<i>Michael Ray Smith</i>	631
Operation Rescue’s Anti-Abortion Rescue Blockades and 42 U.S.C. § 1985(3) (a/k/a the Ku Klux Klan Act)	
<i>Elizabeth A. Roberge</i>	333

Personal Liability for Bank Directors Who Violate Lending Limit Statutes: Has Indiana Followed Congress' Lead? <i>Mitchel A. Mick</i>	387
The Scope of Federal Preemption: How Far May States Go in Regulating Multiple Employer Welfare Arrangements Es- tablished Under ERISA? <i>Catherine M. Morrison</i>	151
The Warranty of Sperm: A Modest Proposal to Increase the Accountability of Sperm Banks and Physicians in the Per- formance of Artificial Insemination Procedures <i>Anita M. Hodgson</i>	357

TABLE OF CASES

A

Abbott Laboratories v. Mead Johnson v. Co.	838-41
Abington School District v. Schempp	474, 476, 481, 484, 509
Abron v. State	905
Acuna v. State	912
Adams v. Clean Air Systems, Inc.	1185
Aetna Insurance Co. v. Rodriguez	1054
Aguilar v. Felton	470, 484
Ake v. Oklahoma	83
Albala v. City of New York	1187
Albro v. Indianapolis Education Association	1074-75
Alexander v. Gardner-Denver Co.	1071-73
Alexander v. State	915
Allegheny Pittsburgh Coal Co. v. County Commission	645-46
Allred v. State	441
American Auto Association v. AAA Insurance Agency, Inc.	578
American Cyanamid Co. v. S.C. Johnson & Son, Inc.	575
American Economy Insurance Co. v. Motorists Mutual Insurance Co.	1063-64
American Family Mutual Insurance Company v. National Insurance Association	1058
American Federation of State, County, and Municipal Employees v. Ward	1092-95
Ameritrust National Bank, Michiana v. The Domore Corp.	774-75
Anderson v. Bessemer City	129, 131, 133-34, 137
Anderson v. Creighton	187, 189, 201, 207, 214, 219, 224
Andrews v. State	919
Apostol v. Gallion	217
Arlington Heights v. Metropolitan Housing Development Corp.	872, 880
Asahi Metal Industry v. Superior Court	831
Aschliman v. State	914-15

Atkins v. Atkins	981
Atteberry v. Atteberry	986
Audio Enterprises v. B & W Loudspeakers	832

B

Babcock v. Lafayette Home Hospital	861, 1035
Baker v. Chrysler Corp.	1205
Baker v. Compton	776-78
Baker-Chaput v. Cummett	639-41
Bals v. Verduzco	1065, 1067
Barger v. State	912
Barnard v. Kruzan	815
Barnes v. Barnes	972, 997
Barr v. Rivinius, Inc.	1205
Barrantine v. Arkansas-Best Freight Systems, Inc.	1072
Bartrom v. Adjustment Bureau, Inc.	999, 1000
Baskin v. State	904
Bates v. State Bar of Arizona	13-15, 17, 29
Bath v. Courts	1143
Batson v. Kentucky	846, 849
Battershell v. Prestwick Sales, Inc.	788
Baumgartner v. United States	142
Beauharnais v. Illinois	413
Becker v. Plemmons	1038
Bedwell v. De Bolt	1169
Beer Nuts, Inc. v. Clover Club Foods Co.	584
Bell v. Employee Security Benefit Ass'n	160
Bellah v. Greenson	445
Bellotti v. Baird	456
Bemis Co. v. Rubush	1207
Bethlehem Steel v. Indiana Department of State Revenue	1150
Billman v. Hensel	767-68
Bivens v. Six Unkown Named Agents of Federal Bureau of Narcotics	190
Black v. Bayer	223
Blairer Laboratories, Inc. v. Clobes	795
Board of Education v. Dowell	867, 872-73, 880, 882-84, 886-88

- Boesel v. State 908
 Bone v. Association Management Services, Inc. 170
 Bose Corp. v. Consumers Union of United States, Inc. 125, 131, 134, 140-44
 Boston Athletics Association v. Sullivan 571
 Boswell Grain & Elevator, Inc. v. Kentland Elevator and Supply, Inc. 764-65
 Bourjaily v. United States 970
 Bowen v. Georgetown University Hospital 1077-78
 Boyle v. Anderson Firefighters Association Local 1261 1045
 Bradford National Life Insurance v. Union State Bank 819
 Brady v. Maryland 69, 816-17
 Brady v. State 900, 975
 Branch v. Tunnell 195
 Brane v. Roth 794-96
 Braster v. State 914
 Bray v. Alexandria Women's Health Clinic 333, 342-43, 346, 350-53, 355
 Brenner v. Powers 791
 Brooks v. Robinson 997
 Broshears v. State 905-06
 Brown v. Allen 131
 Brown v. Board of Education 143, 684-85, 867, 880
 Brownlee v. Conine 834
 Brunner v. Hand Industries, Inc. 1075
 Budnick v. Citizens Trust and Savings Bank 391
 Buenrosto v. Collazo 209
 Buffalo Tool and Die Manufacturing Co. v. Commissioner 45, 47, 49, 54
 Burch v. State 971
 Burger King Corp. v. Hall 585
 Burleson v. Illinois Farmers Insurance Co. 1055-56
 Burns v. McGregor Electronic Industries 255, 257
 Burrell v. Meads 1162-63, 1190-91, 1193-97
 Buschi v. Kirven 344
 Byrd v. State 899
 Cabell v. Chavez-Salido 515
 Cadillac Fairview/California v. Dow Chemical Co. 950
 Calero-Toledo v. Pearson Yacht Leasing Co. 91, 96, 99, 100, 103, 105-06, 112, 108
 Califano v. Aznavorian 644
 California v. Hodari D. 121, 127, 129, 136-146
 Callis v. State Automobile Insurance Co. 1054
 Campbell v. Criterion Group 810, 854
 Cap Gemini America, Inc. v. Judd 784
 Car Carriers, Inc. v. Ford Motor Co. 942
 Caracciolo v. Ballard 25
 Carden v. Arkoma Associates 818
 Carey v. Population Service International 459
 Carr v. Carr 991-92
 Carr v. State 908-09
 Carroll v. United States 136
 Carter v. Inter-Faith Hospital of Queens 381-82
 Carter v. Morrow 995-96
 Cash v. State 919
 Castor v. State 907
 Center Township v. Coe 635, 637, 643-46, 656
 Centrium Group v. State Board of Tax Commissioners 1156
 Chaiken v. Eldon Emmor & Co., Inc. 1167-68
 Chambers ex rel. Hamm v. Ludlow 1043, 1048
 Chaplinsky v. New Hampshire 413, 419
 Chase Federal Savings & Loan Ass'n v. Chase Manhattan Financial Services, Inc. 586
 Chemical Waste Management, Inc. v. Hunt 922
 Chicago Tribune v. NLRB 1078-80, 1082
 Citizens State Bank v. Federal Deposit Insurance Corp. 400
 City of Cleburne v. Cleburne Living Center, Inc. 644
 City of Gary v. Allstate Insurance Co. 1061

City of Los Angeles v. Heller	199
City of Wakarusa v. Holdeman	1200
City of Valparaiso v. Edgecomb	1200
Clark v. Jones	1155
Clark v. State	854, 908
Claussen v. Warner	1117
Cluett, Peabody & Co. v. CPC Ac- quisition Co.	30
Cobb v. Cobb	994-95
Cockrill v. Cooper	399
Cohen v. Beneficial Indus. Loan Corp.	194
Cohen v. California	413
Cole Real Estate Corp. v. Peoples Bank & Trust Co.	1230-31, 1238, 1241
Coleman v. Thompson	65-66, 76-79, 81-85, 88
Collins v. Covenant Mutual Insur- ance Co.	1025
Collins v. Hardyman	338
Collins v. Thakkar	1026, 1027
Comfax Corp. v. North American Van Lines, Inc.	1183-84
Commissioner v. Duberstein	132
Commissioner of Labor v. Talbert Manufacturing Co.	1070
Committee for Public Education & Religious Liberty v. Regan	484
Compton v. State	915
Continental Grain Co. v. Barge FBL-585	666-67
Convenient Food Mart v. 6-Twelve Convenient Mart	575-76
Cooter & Gell v. Hartmarx Corp.	138
Cory v. Carter	651
County Department of Public Wel- fare of Vanderburgh County v. Deaconess Hospital, Inc.	1011
County of Allegheny v. ACLU	483- 84, 507, 509, 514-16
Craig v. Boren	644, 653
Crain Communications, Inc. v. Fair- child Publications, Inc.	579
Craven v. State Farm Mutual Insur- ance Co.	1053, 1062
Crawford-El v. Britton	214
Cressy v. Shannon Continental Corp.	1224-26, 1234
Crosby v. State	917
Cruzan v. Missouri Department of Health	461-62, 464

Culbertson v. Mernitz	1029-30
Cullison v. Medley	1181-82
Culombe v. Connecticut	140
Culver v. Town of Torrington	218

D

Dague v. City of Burlington	949, 953-54
Dague v. Piper Aircraft Corp.	1204
Dale Bland Trucking, Inc. v. Kiger	761-63
Dandridge v. Williams	642, 649
Daniels v. USS Agri-Chemicals	834
Data Processing Services, Inc. v. L.H. Smith Oil Corp.	777
Daugherty v. Campbell	203
Davis Contruction Co. v. Board of Commissioners	652-54
Dawson v. Compton	1108
Decosta v. Viacom International, Inc.	571-72
Dehmlow v. Austin Fireworks	831
del Junco v. Conover	397-98, 404, 407
DeMoss Rexall Drugs v. Dobson	1052
Dennis v. Higgins	1145
Detrick v. Midwest Pipe & Steel, Inc.	783, 785
DiBella v. United States	123
Dickey v. Long	1029, 1039
Dieter v. B. & H. Industries of Southwest Florida	550-51, 571, 576, 585
Dillon v. Glover	1042
Doe v. Bolton	344
Doe v. State of Louisiana	217
Doe v. University of Michigan	420, 422
Dolliver v. State	918
Donahue v. Rodd Electrotpe Co.	1220, 1222-23, 1229
Dortch v. Lugar	649
Dotlich v. Dotlich	1233, 1242, 1244
Dowell v. State	909
Dred Scott v. Sandford	510
Driver v. State	900
Duchon v. Ross	1138

E

E. & J. Gallo Winery v. Gallo Cat- tle Co.	552-53, 559, 582
---	------------------

Gray v. Chacon	1180
Great American Federal Savings & Loan Association v. Novotny	339, 353-54
Great American Insurance Co. v. GRE America Corp.	579
Green v. County School Board of New Kent County, Virginia	871-75, 877, 879
Green v. Felton	1232
Griffin v. Breckenridge	38-41, 344, 349, 351, 355
Griffin v. Elkhart General Hospital, Inc.	1069
Griffith v. Jones	1031-32
Griffith v. Webb	986
Griggs v. Duke Power	1093-94
Griswold v. Connecticut	508, 684-85, 689
Groos National Bank v. Comptroller of Currency	397
Guinn v. Light	1024
Gurnik v. Lee	783

H

H.J. Inc. v. Northwestern Bell Telephone	835
Hallstrom v. Tillamook County	938-40, 952-55
Hamilton v. Caterpillar, Inc.	1086-87
Hammer v. State	650-51
Hardiman v. Governmental Interinsurance Exchange	1064
Hardy v. South Bend Sash & Door Co.	789, 1235-36
Harlan Sprague Dawley, Inc. v. Indiana Department of State Revenue	1145-46
Harlow v. Fitzgerald	187, 194, 220, 223
Harris v. Reed	78-82
Harrington v. State	902
Hartung v. Architects Hartung/Odle/Burke, Inc.	1223-24, 1226, 1228-29, 1233, 1243
Haydon Switch & Instrument, Inc. v. Rexnord, Inc.	573
Heflin v. Stewart County	202-03
Helms v. Duckworth	1219-20, 1223, 1229
Hillard v. City and County of Denver	205

Hilligoss v. Associated Companies, Inc.	792
Holmes v. State	914
Hopkins v. State	908
Hopson v. Schilling	633
Hrisomalos v. Smith	1123
Huber v. Huber	979
Huddleston v. United States	969-70
Hudson v. McMillian	219
Huffman v. Monroe County Community School Corp.	1165-69, 1176
Hughes v. Hughes	982
Hunter v. Bryant	205, 207, 213, 222
Hvidston v. Eastridge	1118

I

INB Banking Co. v. Opportunity Options, Inc.	764
INS v. Delgado	121, 127-28, 137
Illinois ex rel. McCollum v. Board of Education	472
In re A.H. Robins Co.	19, 30
In re Ackerman	1109-10
In re B	443
In re Case	1108-09
In re Cawley	1098, 1102
In re Edwards	759
In re Farrell	462-63
In re Frosch	1098, 1104
In re Grabill Corp.	759
In re Grissom	985-86
In re Gutman	1104
In re Hunter	750-51
In re Jarrett	1098, 1100
In re Levinson	1107, 1109-10
In re Lifshutz	442
In re Love	755
In re Lybrook	757-58
In re Lyons	752
In re Marriage of McManama	978
In re Ortiz	1110
In re Paepflow	751
In re Paternity of S.R.I.	998
In re Phillip B.	467
In re Quinlan	465
In re Sampson	467
In re Smith	753
In re Tax Assessments Against Oneida Coal Co.	646
In re Willmann	467
In re Woods v. State	917

Indiana Department of Environmental Management v. Chemical Waste Management of Indiana, Inc.	930	Indiana Department of State Revenue	1150
Indiana Department of Natural Resources v. United Refuse Co., Inc.	956	Johnson-El v. Schoemehl	204
Indiana Department of Public Welfare v. Payne	1005	Jones v. Flagship International	247, 249-50, 253, 257
Indiana Department of Revenue v. Caylor-Nickel Clinic	1149	Jones v. State	911
Indiana Department of State Revenue v. General Motors Corp.	1149	Jones v. United States	122
Indiana Department of State Revenue v. Johnson County Farm Bureau Cooperative Association	1150	Jump v. Bank of Versailles	1193
Indiana Department of State Revenue v. Wechter	1150	Justus v. Justus	984
Indiana High School Athletic Association v. Schafer	861-62		
Indiana Insurance Co. v. Plummer Power Mower & Tool Rental, Inc.	1055-56	K	
Indiana State Board of Public Welfare v. Tioga Pines Living Center, Inc.	1009, 1020	K.H. v. Morgan	189
Ingersoll-Rand Corp. v. Scott	1048-49	Keds Corp. v. Renee International Trading Corp.	571-72
Inman v. Farm Bureau Insurance	1062	Keliher v. Cure	767
Insul-Mark Midwest, Inc. v. Modern Materials, Inc.	776-79	Kendrick v. State	904
International Graphics v. United States	13	Kennedy v. Tri-City Comprehensive Community Mental Health Center, Inc.	1163-65
Isom v. State	913	Kettery v. Heck	1131
		Keystone Carbon Co. v. Black	1067-69
		Kinsey v. Bray	1191-92
		Kleiman v. State	861
		Kochin v. Eaton Corp.	1205-06
		Koller v. Richardson-Merrill, Inc.	30
		Koske v. Townsend Engineering Co.	1206, 1208-09
		Krukemeier v. Krukemeier Machine & Tool Co.	1228-30, 1231
		Kubale v. DeSoto, Inc.	818
		Kulwicki v. Dawson	214-15
		Kyle v. Kyle	995-96

J

Jackson v. Metropolitan Edison Co.	438
Jackson v. Paris	802
Jehovah's Witnesses v. King County Hospital	466
Jenkins v. State	910
John Morel & Co. v. Reliable Packing Co.	547
Johnson v. Estate of Laccheo	214
Johnson v. Glick	219, 222
Johnson v. Jones	26
Johnson v. Pettigrew	1195-97
Johnson v. St. Vincent Hospital, Inc.	649, 652
Johnson v. State	905, 913
Johnson County Farm Bureau Cooperative Association, Inc. v. The	

L

Laird v. Tatum	516
Lamb v. Wenning	988
Lane v. Candura	460-61
Lannan v. State	896-97, 965, 967-69, 971-73
Larimore v. Comptroller of Currency	394, 398-400, 404, 407
Larimore v. Conover	398
Larson v. Lalente	509
Lawyers Title Insurance Corp. v. Pokraka	1141
Lee v. Weisman	470, 479-81, 482-85, 500-01, 503-04, 509, 515-17
Leehaug v. State Board of Tax Commissioners	1147-48
Leininger v. Gren	1058

Leisure v. Leisure	979	McCoy v. Court of Appeals of Wisconsin	17, 23
Lemon v. Kurtzman	484-85	McCulloch v. Maryland	391
Lenhert v. Ferris Faculty Association	1074-75	McGowan v. Maryland	496, 502
Leonard v. State	909	McIntyre v. Guthrie	958-59
Liberty Mutual Insurance Co. v. Metzler	1059	McKeown v. State	900-01
Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.	576	Mead Data Central v. Toyota	557-58
Lipsett v. University of P.R.	236, 252-53	Meesing v. Commissioner	45
Little Caesar Enterprises v. Pizza Caesar, Inc.	579	Mehling v. Dubbois County Farm Bureau Cooperative Association, Inc.	1185
Livingston v. Livingston	980-81	Meinhard v. Salmon	1219
Local No. 391 v. Terry	29	Meritor Savings Bank v. Vinson	228-29, 231-32, 237-40, 247, 249, 256, 259, 413
Long v. Norris	193	Merrill v. Merrill	993-94
Lowell Staats Mining Co. v. Philadelphia Electric Co.	942	Metro Holding Co. v. Mitchell	1157-58
Lowry v. Lowry	786, 1234-35	Metropolitan Life Insurance Co. v. Massachusetts	153, 155-57, 159, 166, 169-71
Lucas v. South Carolina Coastal Council	959, 961-62	Meyer v. Nebraska	453
Lulay v. Lulay	978-79	Michigan v. Chesternut	121, 127-28, 146
Lutheran Hospital of Indiana, Inc. v. Indiana Department of Public Welfare	1012	Michigan v. Long	78-81, 654
Lynch v. Donnelly	470, 484, 509, 515	Miller v. State	910
Lytle v. Miller	806-07	Miller v. Terre Haute Regional Hospital	1023-24
M		Miller v. Todd	1208-09
Maciosek v. Blue Cross & Blue Shield United of Wisconsin	170	Miss World Ltd. v. Mrs. America Pageants, Inc.	583
Madlem v. Arko	1160	Mississippi Women's Medical Clinic v. McMillan	347, 352
Major v. Van Dewalle	656	Mitchell v. Forsyth	194, 207-08, 213-18, 225-26
Mallard v. United States District Court	29	Monell v. Department of Social Services	195, 198-99
Maloolley v. McIntyre	1040-41, 1047	Money Store v. Harriscorp Finance, Inc.	535, 539, 559
Marbury v. Madison	854	Monroe v. Mazzarano	198
Marsh v. Arn	203	Monroe v. Pape	198
Marsh v. Chambers	484	Montana v. United States	942-43
Marshak v. Sheppard	573	Montgomery Ward & Co. v. Gregg	1209-10
Marshall v. N.L. Industries	1071	Montgomery Ward and Co. v. Tackett	1067-69
Massiah v. United States	70-71	Moore v. Gwinnett County	219
Masterman v. Veldman's Equipment, Inc.	1205	Moore v. National Ass'n of Securities Dealers	18, 30
Mathews v. Eldridge	96, 109-10, 112-14	Moore v. Regents of the University of California	375, 378-79
Matuga v. Matuga	983	Mozee v. American Commercial Marine Service Co.	1076-77
May v. State	903		
McAdams v. Dorothy Edwards Realtors, Inc.	1127		
McCleskey v. Zant	65-66, 68, 70-75, 76, 78, 82-83, 88		

Mozzochi v. Borden 201
 Munters Corp. v. Matsui America,
 Inc. 551, 576, 580
 Murray v. Carrier 84
 Murrin v. Midco Communications,
 Inc. 582

N

NLRB v. Acme Industrial Co. 1079
 NLRB v. Truitt Manufacturing Co.
 1079-82
 National Abortion Federation v. Op-
 eration Rescue 348-49
 National Organization for Women
 v. Operation Rescue 342
 Navarro v. Subaru of America 820-
 22
 New York Times Co. v. Sullivan
 131, 141, 144
 Nike, Inc. v. "Just Did It"
 Enterprises 551, 581
 Nil v. Nil 981
 Northern Pipeline Co. v. Marathon
 Pipeline Co. 759
 Northern Trust Co. v. Bunge Corp.
 818
 Northern Virginia Women's Medical
 Center v. Balch 342
 Northrop Copr. v. AIL Systems 823,
 826
 Nunn v. State 912, 972

O

Oelling v. Rao 1038
 Ohio v. Akron Center for Repro-
 ductive Health 457
 Ohralik v. Ohio State Bar Ass'n 17,
 29
 Oladeinde v. City of Birmingham 194
 O'Neal v. Throop 1034
 Opportunity Options and
 Woodbridge 765
 Ore-Ida Foods v. Richmond Trans-
 portation Service 826
 Oreck Corporation v. United States
 Floor System, Inc. 576-77
 Oregon v. Kennedy 134
 Ortho Pharmaceutical Corp. v.
 Chapman 1045
 O'Shea v. Littleton 96
 Oskiera v. Chrysler Motor Corp.
 579-80

Owen v. City of Independence 193,
 199

P

Paddock v. Chacko 434
 Pafco General Insurance Co. v.
 Providence Washington Insurance
 Co. 1062
 Palmer v. City of San Antonio 195
 Palsce v. Guarantee Trust Life In-
 surance Co. 1057-58
 Parham v. J.R. 454-55
 Park 'N Fly, Inc. v. Dollar Park &
 Fly, Inc. 156, 519-20, 523, 529-31,
 543, 547-49, 551, 567-68, 570,
 573-77, 580-82, 584, 586
 Pastrick v. Geneva Township 636,
 640
 Paul v. Davis 191
 Pedrick v. State 911
 Pelletier v. Federal Home Loan
 Bank 217
 Pennington v. Fourth National Bank
 662
 Pennington v. Pennington 987
 Pennsylvania Coal Co. v. Mahon 961
 People v. Ruggles 494
 Pepper v. Litton 1217
 Perez v. Brownell 512, 514
 Perez v. Gilbert 1117
 Perlmutter v. Beth David Hospital
 67, 368, 370-72, 376, 380, 382-83
 Pesek v. City of Brunswick 226
 Peters v. Judd Drugs, Inc. 1210
 Phillips v. Cameron Tool Corp.
 1207-10
 Pierce v. Society of Sisters of the
 Holy Names of Jesus and Mary 454
 Pike v. Bruce Church, Inc. 924-25
 Pirnat v. State 897, 967
 Pirone v. MacMillan, Inc. 563
 Planned Parenthood v. Casey 333,
 457
 Planned Parenthood v. Danforth
 448
 Platt v. State 919
 Ploh v. NN Investors Life Insur-
 ance Co. 1058
 Polaroid Corp. v. Polaroid, Inc. 557
 Porter v. Whitehall Laboratories 843-
 44
 Portland v. Bagley 206

Portland Feminist Women's Health Center v. Advocates. for Life, Inc.	341
Poulos v. Naas Foods	829-30
Poynter v. Poynter	990
Prenatt v. Stevens	977
Price v. State	858, 864
Prince v. Massachusetts	466
Pritchett v. Alford	209
Prokey v. Watkins	210
Propst v. Weir	196
Pullman-Standard v. Swint	131

Q

Quebe v. Davis	1132
Quezada v. County of Bernalillo	220

R

R.A.V. v. City of St. Paul	430-31, 855, 858-59
Rabidue v. Osceola Refining Co.	228-29, 237, 240, 242-43, 246, 254, 257, 259
Rainey v. Conerly	213
Ray v. State	903
Redmon v. County of San Diego	218
Regan v. Cherry Corp.	950
Reilly v. Blue Cross & Blue Shield United of Wisconsin	170
Reilly v. Cavanugh	1108
Reilly v. Robertson	651, 653, 655
Reise v. Board of Regents	841
Rich v. City of Mayfield Heights	202
Richardson v. Marsh	900
Richey v. Chappell	1051-53
Richmond Tenants Organization, Inc. v. Kemp	95-98, 102, 104, 106-11, 113-14
Richmond Tenants Organization v. Richmond Redevelopment and Housing Authority	104, 107
Robinson v. Jacksonville Shipyards, Inc.	229, 241, 243, 245, 247 250-51, 253-54, 256, 258-61
Robinson v. State	856-58
Roe v. Abortion Abolition Society	346-47
Roe v. Wade	333, 642
Rohrbaugh v. Wagoner	652
Roth v. United States	141, 144

Russell v. Community Blood Bank, Inc.	379, 380-82, 384
---------------------------------------	------------------

S

SFN Shareholders Grantor Trust v. Indiana Department of State Revenue	783, 785
San Antonio Independent School District v. Rodriguez	647
Sanchez v. Sanchez	198
Salve Regina College v. Russell	133, 135, 137, 140
Sanders v. Cole Municipal Finance	1175
Sanders v. State	919
Sanders v. United States	71-73
Sandilla v. State	915
Sapp v. Morton Buildings, Inc.	1211-12
Saunders v. State	902
Schueneman v. Schueneman	980-81
Scott v. Anderson Newspapers, Inc.	1224-26
Scott v. Sears, Roebuck & Co.	239, 249-51, 253
Scott v. State	906-07
Scott-Gordon v. State	911
Selke v. Selke	981
Service Merchandise Co. v. Service Jewelry Stores, Inc.	578
Sewell v. State	916
Seymour National Bank v. State	1199-1200
Shaffer v. Heitner	660, 664, 666-67
Shaw v. Delta Airlines, Inc.	153, 155-57, 159, 169
Sherry Designs, Inc. v. State Board of Tax Commissioners	1146
Shuamber v. Henderson	1182-84
Sidle v. Majors	650
Siegert v. Gilley	190-96, 201, 207-08, 214, 222-24
Sigsbee v. Swathwood	1135
Silver v. Franklin Township	191
Sims v. Metropolitan Dade County	226
Sims v. State	898
Singer Manufacturing Co. v. Briley	530
Singer Manufacturing Co. v. June Manufacturing Co.	530
Skiver v. Brighton Meadows	1136

Slattery v. Rizzo 221
 Smith v. Breeding 1154-56
 Smith v. Smith 998
 Snider v. State 912
 Snyder Elevators, Inc. v. Baker 1194
 Source Serv. Corp. v. Chicagoland
 Jobsource, Inc. 580
 Source Serv. Corp. v. Source Tele-
 computing Corp. 580
 South Bend Community Schools
 Corp. v. Widawski 1197-99
 Southern v. How 522
 Sowell v. State 903
 Spencer v. Christiansen 1040
 Spirol International Corp. v. Vogel-
 sang Corp. 574
 Sporhase v. Nebraska 926
 St. Anthony Medical Center v.
 Smith 1028
 Stanek v. State 904
 State v. Adams 957-59
 State v. Garcia 804
 State v. Hartman 910
 State v. Huebner 945
 State v. Nixon 919
 State v. Roth 918
 State v. Rusk 234-36
 State v. Rendleman 862-63
 State ex rel. Goldsmith v. Marion
 Superior Court 892-93
 State ex rel. Prosser v. Indiana
 Waste Systems, Inc. 943, 947
 State ex rel. Van Buskirk v. Wayne
 Township 635-37, 641-43, 654-56
 State Farm Mutual Automobile In-
 surance Co. v. Conway 1063
 Stemmons v. Toyota Tsusho
 America 820-22
 Stephenson v. Frazier 776-79
 Steup v. Indiana Housing Finance
 Authority 652-54
 Stewart v. Donges 217
 Stewart v. Walker 1060
 Stissi v. Interstate & Ocean Trans-
 port Co. 18, 24
 Stone v. Peacock 209
 Stoner v. Rice 1143
 STOP v. Heritage Group 942-43,
 947, 952, 954
 Strickland v. Washington 84-85
 Stump v. Commercial Union 1056-57
 Stump v. Indiana Equipment Co.
 1203-04

Sturruv v. Mahan 861-62
 Surgical Associates, Inc. v.
 Zabolotney 1037

T

T & W Building Co. v. Merrillville
 Sport & Fitness, Inc. 1135
 TSO v. Delaney 833-34
 Taggart v. State 900
 Tarasoff v. Regents of the Univer-
 sity of California 444-45, 450
 Tate v. Secura Insurance 1064
 Taylor v. State 917
 Tennessee v. Garner 219
 Terpstra v. Terpstra 989
 Terry v. Ohio 120, 127-28
 Terry v. State 919
 Texas Pig Stands, Inc. v. Hard
 Rock Cafe International, Inc. 577-
 78
 Tharp v. Commonwealth 83
 Thorpe v. Housing Authority of
 Durham 1077
 Thurman v. State 919
 Time, Inc. v. Pape 141-42
 Title v. Mahan 1199-1200
 Torcaso v. Watkins 488
 Town of Beverly Shores v. Bagnall
 959
 Townsend v. Sain 131
 Treschman v. Treschman 998
 Trop v. Dulles 512
 Transamerica Corp. v. Trans Ameri-
 can Abstract Service, Inc. 573
 Tudder v. Torres 1029
 Tyler v. Judges of the Court of
 Registration 659
 Tyson v. State 808

U

Uni*Quality v. Infotronx 835
 United States District Court for the
 Southern District of Illinois in
 United States v. Parcel I Begin-
 ning at Stake 102
 United Brotherhood of Carpenters
 v. Scott 339-40, 346-47, 350-51,
 354-55
 United Farm Bureau Mutual Insur-
 ance Co. v. Lowe 1062
 United Mine Workers v. Illinois
 State Bar Ass'n 17, 24

United States Jaycees v. Cedar Rapids Jaycees	582	Union Federal Savings Bank v. INB Banking Co. Southwest	769, 772-73
United States v. \$8,850 in U.S. Currency	91, 106, 110-11	Unwin v. Campbell	215
United States v. \$10,000 in United States Currency	663-64, 666-67	USAir, Inc. v. Indiana Department of State Revenue	1150
United States v. \$79,000 in United States Currency	663, 665-66		V
United States v. \$1,322,242.58	670-71, 674	Van Sice v. Sentany	1025
United States v. Aiello	665, 670, 673-74	Vaughan v. Vaughan	998
United States v. Central Adjustment Bureau, Inc.	30	Vergara ex rel. Vergara v. Doan	1033, 1038
United States v. Certain Property Belong to Hayes	665, 669	Voss v. Lynd	1113
United States v. Four Parcels of Real Property	668		W
United States v. Frady	74	W & W Equipment Co., Inc. v. Mink	1216, 1227-29, 1237-38, 1241-44
United States v. Gutman	1105, 1107, 1109-10	Wade v. Hegner	197
United States v. Harris	338	Wagerman v. State	915
United States v. Heldt	19, 30	Wainwright v. Sykes	72, 77
United States v. Maragh	139	Walker v. Chatfield	986
United States v. McConney	133	Walker v. Rinck	1186-90
United States v. McKines	125, 137-39	Wallace v. Jaffree	484, 501
United States v. Mendenhall	120-21, 125, 127, 136-38, 147	Walz v. Tax Commission	484
United States v. Monsanto	98	Warlick v. Cross	209
United States v. One 1983 Home-made Vessel Names "Barracuda"	668	Warren v. Dwyer	210
United States v. One Lear Jet Aircraft	663-64, 666, 669-70, 672-73, 675-76	Washington v. Davis	872, 879
United States v. One Lot \$25,721 in Currency	670-71, 673	Washington v. Harper	640
United States v. Parcel I Beginning at Stake	98, 106, 675	Watson v. Strohl	775
United States v. Premises and Real Property Located at 4492 Livonia Rd.	97, 109, 113	Wayne Township v. Hunnicutt	633, 641
United States v. Property at 850 S. Maple, Ann Arbor, Michigan	100, 106-07	Webb v. Jarvis	1186-93
United States v. Salerno	974-75	Wehling v. Citizens National Bank	1139, 1159-62
United States v. Swift & Co.	870	Weidner v. Thieret	132
United States v. Tit's Cocktail Lounge	663-66, 673	Weil Ceramics & Glass, Inc.	575
United States v. U.S. Gypsum Co.	126	West v. Mississippi	27
Union Carbide Corp. v. Ever-Ready, Inc.	547	White v. City of Rochford	205
		White v. Illinois	975
		White v. Roughton	639-41
		White v. Taylor	201
		Whitley v. Albers	218-19
		Whitt v. Ferris	1121
		Wilcox v. Wilcox	978
		Wilkes v. Springside Nursing Home, Inc.	1221-22, 1226, 1229, 1236-37
		Williams v. State	916
		Williamson v. City of Virginia Beach	205
		Wilson v. State	901

Wisconsin v. Yoder	454
Women's Health Care Service v. Operation Rescue-National	342
Wong Sun v. United States	122
Wood v. Ostrander	204-05
Wood v. Strickland	188
Woodbridge Place Apartments v. Washington Square Capital, Inc.	763, 765, 767-68
Woodruff v. Bowen	1162
Woodward v. City of Worland	193
World-Wide Volkswagen v. Woodson	831
Wright v. Whiddon	192
Wyatt v. Cole	188
Wynn Oil Co. v. Thomas	567, 571, 578-81

X**Y**

Yates v. Avco	230
Yales v. City of Cleveland	220
Yeager v. Bloomington Obstetrics and Gynecology, Inc.	1186-87, 1190
York v. Union Carbide Corp.	1206-07
Young v. State	918
Youngberg v. Romeo	452
Younts v. St. Francis Hospital & School of Nursing, Inc.	439

Z

Zapffe v. Srbeny	959, 1143
Zakrowski v. Zakrowski	994
Zebrowski and Associates, Inc. v. City of Indianapolis	762-63
88 Cents Stores, Inc. v. Martinez	565

